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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 234

THE SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

vs.

HENRIETTA MEYER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF OF PLAINTIFF IN ERROR.

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PROCEEDINGS IN THE CASE.

The plaintiff, Henrietta Meyer, is the person named in a certain benefit certificate as payee of the fund therein described, and the defendant, The Supreme Lodge, Knights of Pythias, issued the said benefit certificate at the City of Chicago, and State of Illinois.

See paragraph second of complaint and certificate of membership thereto annexed (Rec., fols. 4 to 7 inclusive).

The plaintiff in error is a federal corporation, organized under the act of Congress, approved June 29, 1894.

(See paragraph first of complaint, Rec., fol. 3.)

The plaintiff on the 30th day of December, 1901, brought this action in the Supreme Court of Queens county, in the

State of New York, to recover the sum of two thousand ($2,000) dollars on said benefit certificate.

(See complaint, Rec., fols. 3 to 7 inclusive.)

The defendant, on the 20th day of January, 1902, offered to allow judgment to be taken against it by the plaintiff for the sum of three-hundred and fifty-three and 76/100 dollars, with interest from the 29th day of September, 1900, to the date of the offer, with costs.

(See offer of judgment, Rec., fol. 7.)

Thereafter and on the same day the defendant interposed an answer in which it pleaded, that the death of Emanuel Meyer, to whom was issued the benefit certificate in question, resulted from suicide, in that, he did deliberately kill himself, and that pursuant to the terms of the by-laws and contract between him and the defendant, there became and was due from the defendant to the plaintiff the sum only for which judgment had been offered.

(See answer, Rec., fols. 8 to 15 inclusive.)

Thereafter, upon the issues thus raised, the case was called for trial on the 21st day of October, 1902, at the court house of said court, before Hon. William J. Gaynor, justice, and a jury, and after a trial of said issues there was left to said jury by the learned trial justice for answer the following question: "Did the deceased commit suicide?" and said jury did answer: "No" thereto, and the court did thereupon direct judgment for the plaintiff in the sum of two thousand two hundred and forty and 66/100 dollars.

(Trial Minutes, Rec., fol. 16.)

Judgment was thereupon and on the 28th day of October, 1902, entered in the sum of two thousand four hundred and sixty-two and 03/100 dollars, which, by an order of said court, was duly reduced, on the 12th day of November,

1902, to two thousand four hundred and forty two and 03 100 dollars.

(Rec., fols. 17 and 18.)

On the 23rd of October, 1902, a motion for a new trial, pursuant to the Code of Civil Procedure of the State of New York, was made and denied.

(Rec., fol. 19).

Thereafter, and on the 19th day of November, 1902, the defendant appealed to the Appellate Division of the Supreme Court of the State of New York, for the second judicial department, from said judgment of two thousand four hundred and forty-two and 03/100 dollars, and from said order denying said motion for a new trial.

(Rec., fol. 20.)

Thereafter, said appeal came on to be heard before said Appellate Division of the Supreme Court of the State of New York, which affirmed said judgment and said order of the court below.

(See order of affirmance, Rec., fol. 71 and 72.)

The opinion of said Appellate Division of said Supreme Court of the State of New York, will be found at Rec., fols. 67 to 71, inclusive.

Thereafter, and on the 30th day of April, 1903, a judgment affirming the aforesaid judgment with one hundred and one and 50/100 dollars costs, was entered in the office of the clerk of Queens county, New York.

(Rec., fols. 72 and 73.)

Thereafter, and on the 8th day of May, 1903, the defendant appealed therefrom to the Court of Appeals of the State of New York.

(See notice of appeal, Rec., fols. 73 and 74.)

Thereafter, said appeal coming on to be heard, the said Court of Appeals did affirm said judgment, as will appear by the *remittitur*, dated March 16, 1904.

(Rec., fols. 76 and 77.)

The opinion of the majority of said court affirming said judgment will be found at Rec., fols. 78 to 82, inclusive, and the minority opinion of said Honorable court will be found at Rec., fols. 82 to 88, inclusive.

Thereafter, an order was made and entered on the 18th day of March, 1904, in the office of the clerk of Queens County, New York, by which said order the aforesaid judgment of affirmance of said Court of Appeals of said State of New York was made a judgment of the Supreme Court of the State of New York, in and for the County of Queens.

(See Rec., fols. 90 and 91.)

And, thereafter, and on the 21st day of March, 1904, a judgment of affirmance was entered in said office of the clerk of Queens County, affirming the aforesaid judgments with one hundred and twelve and 40/100 dollars costs.

(See Rec., fols. 92 and 93.)

Thereafter, and on the second day of April, 1904, the defendant gave its bond as plaintiff in error, in accordance with law, and sued out a Writ of Error, which was allowed by Hon. Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, on the fifth day of April, 1904.

(See Rec., fols. a and b.)

And, thereafter, and for cause of error, this plaintiff in error filed its assignment of errors in this Honorable court.

(See Rec., fols. 100 to 107, inclusive.)

STATEMENT OF THE CASE.

On September 6, 1894, Emanuel Meyer, late husband of the defendant in error, made his certain written application upon the form prescribed and furnished by the plaintiff in error to the Board of Control, Endowment Rank, Knights of Pythias, for membership in said Endowment Rank of plaintiff in error, and asked that a benefit certificate for the sum of two thousand dollars be issued to him, payable to his wife, Hattie Meyer, the defendant in error.

(Rec., pages 34-36.)

Upon this application, a certificate of membership for the sum of two thousand dollars was issued to said Emanuel Meyer, in which the defendant in error was named as beneficiary.

(Rec., pages 32-33.)

This certificate of membership was issued by the plaintiff in error, as appears by the In Testimonium clause thereof, at Chicago, Illinois, on the 20th day of September, 1894.

On the 29th day of September, 1900, Emanuel Meyer departed this life at the Iroquois Hotel, in the City of Buffalo, County of Erie and State of New York.

(Rec., fol. 24, 56.)

Upon the trial of this action, at *nisi prius*, the plaintiff in error offered in evidence the following documents which were received without objection or exception on the part of the plaintiff there, the defendant in error here:

a. The certificate of membership; (Rec., fols. 49-51).

b. Application upon which said benefit certificate was issued; (Rec., fols. 51-55).

c. Proofs of death submitted in this case; (Rec., fols. 60–64).

d. Physician's proof of death; (Rec., fols. 55–59).

e. The inquisition of the coroner, not printed as part of this record.

Counsel for the defendant below thereupon undertook to read certain depositions, and the main question in this case relates to the admissability of the testimony of certain medical witnesses, taken upon deposition, and sought to be introduced by the defendant below upon the trial of this action.

The material parts of such deposition which indubitably prove that Emanuel Meyer came to his death by his own hand, and as the result of deliberate suicide, were excluded by the trial court, upon the objection of counsel for the plaintiff below and against the exception of this plaintiff in error, and said depositions so offered and excluded, are printed in the record herein.

(Rec., fols. 25-40; Trans., fols. 16-27.)

The trial court submitted to the jury the question, "Did Emanuel Meyer commit suicide"? and the jury having answered "No," directed judgment in favor of the plaintiff and against the defendant, which said judgment having been sustained in the highest court in the State of New York, to which an appeal could of right be taken, to-wit, the Court of Appeals of the State of New York, the defendant there, comes here as plaintiff in error, and for this and other manifest errors in the record aforesaid, asks this Honorable Court to cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done in the premises.

The facts appearing by the record herein, which it is desired to call particularly to the attention of the court are the following:

One Emanuel Meyer on September 6, 1894, made his certain application in writing to the defendant for membership in said Endowment Rank (Rec., fols. 152-163), and there was issued to him a certain certificate of membership (Rec., fols. 14-20). In said application there are three clauses which the plaintiff in error earnestly asks this court to consider. The first is found at Rec., fols. 158-159:

> "And I hereby, for myself, my heirs, assigns, repre-"sentatives and beneficiaries expressly waive any and "all provisions of law, now or hereafter in force, pro-"hibiting or excusing any physician heretofore or here-"after attending me professionally or otherwise, from "disclosing or testifying to any information acquired "therby, or making such physician incompetent as a "witness; and hereby consent that any such physician "may testify to and disclose any information so derived "or received in any suit or proceeding wherein the "same may be material."

The second is found at Rec., fol. 150, and reads as follows:

> "It is agreed that if death shall result by self-de-"struction, whether sane or insane, voluntary or invol-"untary, or if death is caused or superinduced by the "use of intoxicating liquors, or by the use of narcotics "or opates, or in consequence of a duel, or by the "hands of justice, or in violation of, or attempt to vio-"late any criminal law, then the certificate issued upon "this application shall be null and void, and all claims "on account of such membership shall be forfeited."

This absolute forfeiture was afterward modified by an amendment to the by-laws of plaintiff in error providing

for part payment in case of suicide upon a calculation which resulted in the offer of judgment (Rec., fol. 21).

The third is at Rec., fol. 161, and is as follows:

> "It is agreed that membership shall not begin, and "the certificate of membership shall not be binding, or "in force or effect until this application has been ac- "cepted by the Board of Control, and all required fees "and the first monthly payment has been paid to said "board."

When the plaintiff in error received notice of the death of said Emanuel Meyer, the usual blanks were furnished in order that proofs of death might be made. The attention of the court is respectufily called to the question and answer found in the physician's proof of death at Rec., fol. 170:

> "10. Was death caused by suicide or violence, or "from other than natural causes? If so, state particu- "lars. Suicide. Patient said he was in trouble and "took a white powder, which preceded the above "condition which led to his death."

By Article XII of the by-laws of the plaintiff in error (Rec., fols. 190-192) it was necessary for the beneficiary to furnish proofs of death, and among them the physician's proof. The court admitted the same in evidence (Rec., fol. 61), and it is respectfully urged that said proof of death must be deemed in evidence in this case.

Thereupon the plaintiff in error offered to prove the fact by the testimony of Dr. Bruso, which had been taken by deposition in regular course. That deposition was offered, and although Dr. Bruso did *not* acquire knowledge of the facts sought to be proved at the trial, in order to treat Meyer, and knowledge of such facts was *not* necessary for the treatment given by him, the deposition was excluded over the exception of the plaintiff in error.

The plaintiff in error also sought to prove the same fact (that Meyer had suicided) by the depositions of Dr. Thornton and Dr. McCarthy. On objection these depositions were also excluded, and defendant again excepted.

The plaintiff in error makes the following contentions:

I. That the waiver contained in the application of Emanuel Meyer, so far as it affects the testimony of the physicians attending him, was valid, part of the contract between the parties upon which the plaintiff sued, of the essence thereof, and of the substance thereof, and that the learned trial court erred in ruling to the contrary.

II. That section 836 of the Code of Civil Procedure of the State of New York is not a mere rule of evidence when applied to a case like that of the case at bar, but impairs the obligation of the contract made in, in contemplation of, and pursuant to the laws of the State of Illinois, which is the contract in suit in the case at bar.

III. That the relationship of physician and patient never arose between Dr. Bruso and Emanuel Meyer, and that the exclusion of the deposition of Dr. Bruso by the learned trial court constituted reversible error.

IV. That the fact sought to be proved, although acquired by Dr. Bruso *from* Meyer was not "necessary to enable him (Bruso) to act in that (professional) capacity;" *i. e.*, the fact that Meyer had taken poison with suicidal intent, and that for that reason the deposition was improperly excluded.

V. That the decision in the case of *Holden* vs. *Metropolitan Life Ins. Co.*, (165 N. Y., 13), should be confined to Old Line insurance companies, and not extended to mutual benefit societies of the class of the plaintiff in error.

VI. That the Holden case (*supra*) is wrong both on principle and authority as applied to the case at bar, and

the decision therein should be overruled or limited in its application.

VII. That the exclusion of the affidavit of the attending physician (Rec., fols. 164-173), at Rec., fols. 129-130, constituted reversible error, to the great prejudice of the plaintiff in error, as the same had already been admitted in evidence without objection by the defendant in error (Rec., fol. 61), the same being set forth at (Rec., fols. 164-174).

VIII. That the attempted application of Section 834 of the Civil Code of Procedure of the State of New York to the contract in the case at bar, is a violation of the federal constitution.

IX. That the same is an unconstitutional and unwarranted interference by the Legislature of the State of New York with the contract and right of contract between Meyer and the plaintiff in error. And, as such, void in its application to the contract at bar.

X. That the contract at bar is an Illinois contract, and must be construed with regard to the law of that jurisdiction. There being no evidence of what that law is, it must be adduced from the reported decisions of the courts of that State, or assumed by this Honorable court to be what the common law of the State of New York is.

XI. That under the common law of the State of New York the evidence of Dr. Bruso was admissible in evidence, and its exclusion constituted reversible error.

XII. That under the decisions of the courts of the State of Illinois, it is the well settled law of that jurisdiction that the evidence in question was admissible.

XIII. That the question of whether or not the contract in suit is a contract within the protection of the non-impairment clause of the Federal Constitution, is a federal question to be tested by the decisions of the federal courts

upon that question by which the New York courts are bound and which they must follow.

SPECIFICATION OF ERRORS.

These are all set forth in the record.
(Rec., fols. 100-109.)

First.

ERROR AS TO REFUSAL TO PERMIT THE PROOF OF THE SUICIDE OF EMANUEL MEYER CONTAINED IN THE DEPOSITIONS OFFERED AND EXCLUDED.

The trial court erred in the rejection of the following evidence:

"Q. Let us have your complete diagnosis of the case "at that time.

"Plaintiff in error's counsel: We renew the objection on "all the grounds stated.

"The Court: I have already ruled," *i. e.* [sustain the objection],

"The plaintiff in error excepted."

The trial court further erred in sustaining the objection of the defendant in error and refusing to admit in evidence and excluding therefrom the deposition of C. Frank Bruso, M. D., as the same is set forth on pages 16 and 17 of this record.

The trial court further erred in sustaining the objection of the defendant in error and refusing to admit in evidence and excluding therefrom the deposition of Dr. William Irving Thornton as the same is set forth on pages 17-27 of this record.

The trial court further erred in refusing to admit in evidence and excluding therefrom the certificate of the physician, which said certificate is set forth at Rec., fols. 55–59.

The trial court further erred in charging the jury as follows:

"I have excluded the evidence of the physicians and surgeons who attended him on the ground that they attended the deceased professionally."

SECOND.

REFFUSAL OF THE TRIAL COURT TO GRANT MOTIONS TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL.

After the rendition of the verdict the defendant moved to set aside the verdict aforesaid on the ground that the same is against the evidence, against the weight of evidence and contrary to law; and for a new trial, upon the judge's minutes, upon the same grounds. These motions were denied and exceptions taken by the plaintiff in error and from the order confirming said denial, as well as from the hereinafter set forth judgment, an appeal was duly taken.

THIRD.

THE ENTRY OF JUDGMENT IN FAVOR OF THE DEFENDANT IN ERROR AND AGAINST THE PLAINTIFF IN ERROR FOR THE FULL AMOUNT OF THE BENEFIT CERTIFICATE HEREIN, WITH INTEREST AND COSTS, BY THE TRIAL COURT, IS HEREBY SPECIFIED AS ERROR.

Said judgment was entered on the 28th day of October, 1902, in the sum of two thousand, four hundred and sixty-two and 03/100 dollars, damages and costs, and execution awarded against the defendant, which said judgment was thereafter reduced by order to the sum of two thousand, four hundred and forty-two and 03/100 dollars.

FOURTH.

THE AFFIRMANCE OF SAID JUDGMENT AND SAID ORDER DENYING MOTION FOR A NEW TRIAL, BY THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOR THE SECOND JUDICIAL DEPATMENT, IS HEREBY SPECIFIED AS ERROR.

The said Appellate Division of the Supreme Court for the Second Judicial Department held that the evidence of the said medical witnesses was inadmissable, and upon the *remittitur* of said court, judgment of affirmance was entered on the 30th day of April, 1903, and from said judgment and order of affirmance, appeal was duly taken to the court of last resort open to this plaintiff in error in said State of New York, to-wit, the Court of Appeals thereof.

FIFTH.

THE OPINION OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT BELOW, WHEREIN SAID HONORABLE COURT HOLDS THAT SECTIONS 834 AND 836 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK, UNDER WHICH THE AFORESAID MEDICAL TESTIMONY WAS EXCLUDED, DO NOT CONTRAVENE THE INHIBITION OF THE FEDERAL CONSTITUTION, WHICH PROHIBITS A STATE TO PASS AN ACT IMPAIRING THE OBLIGATION OF A CONTRACT, IS HEREBY SPECIFIED AS ERROR.

(See first paragraph of opinion of GRAY, J. [dissenting], and last paragraph of opinion of Vann, J. [writing majority opinion].)

The proceedings which thereafter resulted in the entry of a judgment of affirmance upon the remittitur of said Court of Appeals, is hereby specified as error. These proceedings will be found set forth in detail in the record.

Sixth.

THE HOLDING BY EACH OF THE COURTS, TO-WIT: THE TRIAL COURT, THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT, AND THE COURT OF APPEALS OF THE STATE OF NEW YORK, THAT THE RELATIONSHIP OF PHYSICIAN AND PATIENT AROSE BETWEEN DR. BRUSO AND EMANUEL MEYER, IS HEREBY SPECIFIED AS ERROR.

This will be argued in the points, *post*.

Seventh.

THE EXCLUSION OF THE CERTIFICATE OF THE PHYSICIAN, TO WHICH REFERENCE HAS HEREINBEFORE BEEN MADE, FROM THE EVIDENCE IN THIS CASE, AFTER THE SAME HAD BEEN DULY ADMITTED IN EVIDENCE WITHOUT OBJECTION OR EXCEPTION, IS HEREBY SPECIFIED AS ERROR.

This will be argued in the points, *post*.

Eighth.

THE RULING OF SAID COURTS THAT THE ADMISSION WITHOUT OBJECTION OR EXCEPTION ON THE PART OF THE PLAINTIFF BELOW OF SAID CERTIFICATE OF SAID PHYSICIAN, OFFERED AS PART OF THE PROOFS OF DEATH, AND THEREAFTER EXCLUDED, WHEN ATTEMPTED TO BE READ UPON THE TRIAL, DID NOT CONSTITUTE A WAIVER OF THE STATUTE IN QUESTION, IS ALSO SPECIFIED AS ERROR.

This will be argued in the points, *post*.

POINT ONE.

The terms of the benefit certificate issued by the plaintiff in error to Emanuel Meyer, the laws and rules of the plaintiff in error, together with the application for membership by Emanuel Meyer, constitute the contract which existed between the member and the society, which instruments construed together measure the rights of the litigants, and are binding in all respects upon the defendant in error.

Sabin vs. *Phinney*, 134 N. Y., 143.
Hellenberg vs. *District No. 1*, 94 N. Y., 580.
Sanger vs. *Rohschild*, 123 N. Y., 577.
Niblack on M. B. Societies, Section 166.
Grossman vs. *The Supreme Lodge*, 13 St. Rep., 592.
Fullenwider vs. *Royal League*, 180 Ill., 625.

Whatever rights the defendant in error has depend upon the benefit certificate issued to Emanuel Meyer, his application for membership and the constitution and by-laws of the plaintiff in error corporation.

Grossman vs. *The Supreme Lodge, supra.*

In the application for membership Emanuel Meyer agreed that self destruction should avoid the certificate issued upon said application (Rec., fol. 160), and he further expressly waived any and all provisions of law then or thereafter in force prohibiting or excusing any physician thereafter attending him professionally or otherwise from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and he further consented that any such physician might testify to and disclose any information so derived or received, in

any suit or proceeding where the same might be material (Rec., fol. 158-159).

It was, therefore, competent for the plaintiff in error to introduce the evidence which the learned trial court excluded, tending to prove that Emanuel Meyer came to his death by his own desire and by means of his own act in swallowing a fatally toxic quantity of poison.

POINT TWO.

The contract in suit is within the protection of the non-impairment clause of the Federal Constitution.

We have seen (Point One, *supra*), that this is a contract made up of the terms of the benefit certificate, the laws of the defendant, and the application for membership. This is no longer an open question.

Emanuel Meyer "willingly and freely subscribed to all" of the application (Rec., fol. 163). It is, therefore, beyond all question that this is a contract entered into with the *assent* of both parties; that their minds met and a contract arose, such as is embraced within the meaning of that term as used in the federal constitution.

FEDERAL CONSTITUTION.

Article I, Section 9, Clause 7.

This contract is therefore, not to have its obligations impaired by any act of the state of New York.

15 Encyc. of Law, 2d Ed., 1032.

The plaintiff in error is not a resident of the state of New York, but is a federal corporation, organized under the act of the Congress of the United States, approved by the president, June 29, 1894, and the Amendatory Act approved by the president June 7, 1900.

See Complaint, Rec. fol. 9.

The contract in suit consisted of an offer (the application) made on the 6th day of September, 1894 (Rec., fol. 152), and its acceptance (Rec., fol. 161).

Pursuant to the terms of the offer, the last act which changed the offer of Meyer into a contract between him and the defendant; that is, the acceptance of the offer, was the issuance of the certificate (Rec., fol. 161), and no other act, matter or thing was necessary after such acceptance was evidenced in this record to create the obligation of contract on the part of the defendant, and the one party being bound by the *contract*, it of necessity follows that the other party was likewise bound by the *contract*.

The acceptance of this offer, which was the act of the creation of the contract between the parties, took place at Chicago, in the State of Illinois, on the 20th day of September, 1894, by the execution of the certificate of membership (Rec., fol. 149). Nothing then remained to be done. The contract had arisen, and the acceptance which made up a contract, took place within the jurisdiction of the State of Illinois.

It is, therefore, an Illinois contract, and the lex loci celebrationis applies.

22 Ency. of Law, 2d Ed., 1324.
Bascom vs. *Zediker*, 48 Neb., 380.
Waldron vs. *Ritchings*, 9 Abb. Pr. N. S., 359.
Armstrong vs. *Best*, 112 N. C., 59.
Equitable Life Society vs. *Clements*, 140 U. S., 226.
Carrollton vs. *Am. Credit Co.*, 124 Fed. R., 25.
Shelton vs. *Haxtun*, 91 N. Y., 124.
McIntyre vs. *Parks*, 3 Metc., 207.
Milliken vs. *Pratt*, 125 Mass., 374.
Gay vs. *Rainey*, 89 Ill., 221.

Buchanan vs. *Drovers' Nat. Bank of Chicago*, 55 Fed. Rep., 223.
Western T. & C. Co. vs. *Kilderhouse*, 87 N. Y., 430.
Merchant vs. *Chapman*, 4 Allen, 362.
Sands vs. *Smith*, 1 Neb., 108.
Hosford vs. *Nichols*, 1 Paige's Ch., 220.
Jewell vs. *Wright*, 30 N. Y., 264.
Merchant's Bank vs. *Griswold*, 72 N. Y., 480.
Dickinson vs. *Edwards*, 77 N. Y., 576.

The case of the *Equitable Life Assurance Company* vs. *Clements*, 140 U. S., 226 (*supra*), came up to this Honorable Court on error to the Circuit Court of the United States for the Western District of Missouri. In that case the question was as to the applicability of a Missouri statute providing a rule of commutation upon default in payment of premiums on the policy and the decision turns upon whether the contract was a New York or Missouri contract.

The facts were that the application was made in Missouri. The defendant admitted that the policy was "at the request of said Wall, transmitted to the state of Missouri and was delivered to said Wall in said state," and the court says at page 232, Mr. Justice GRAY writing the unanimous opinion of the court:

> "If this form of admission does not imply that the policy was, at the request of Wall, transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the

> policy to him in Missouri. Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy, and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

Applying this decision to the case at bar, we find that the essence of the rule laid down by this Honorable Court *is that the contract arises where the last essential act looking to its completion* is of necessity to be performed.

In the case just cited, the last essential act was the payment of a premium during the lifetime of the assured and the delivery of the policy to him during his life. It was then that the contract arose, and not until then, and the place where that last essential act necessary to change an offer to insure, into a contract of insurance, took place, was in the State of Missouri. Wherefore, the court reaches the only possible conclusion, to-wit, that this was a Missouri and not a New York contract.

In the case at bar the last essential act necessary to change the offer, made by the application, into a contract of insurance, was the acceptance of the application of Emanuel Meyer which could only be accepted at the home office of the society by the board of control and the evidence of the acceptance of which in this record is found in the wording of the *In Testimonium* clause of the certificate (Rec., fol. 19) to have been in the City of Chicago, State of Illinois.

The conclusion is irresistible upon the rule of this Honorable Court announced in the Clement's case, *supra*, that the contract arose in, was made with reference to the law of and is in all respects an *Illinois contract*.

The very late case of *Carrollton Furniture Manufacturing Co.* vs. *The American Credit Indemnity Company.* 124 Fed Rep. (*supra*), was decided in the Circuit Court of Appeals for the Second Circuit on a reargument, on July 1, 1903, and supports the contention of the plaintiff in error in the case at bar. That was a contract of credit indemnity and in the opinion of WALLACE, Circuit Judge, concurred in by the rest of the court, he says. quoting the Clements case (*supra*);

> "The conclusion is inevitable that the policy never became a complete contract binding both parties to it, until the delivery of the policy and the payment of the first premium in *Missouri* and consequently that the contract is a Missouri contract and governed by the laws of that state."

This is upon the theory that the last essential act was the payment of the first premium in the State of Missouri during the lifetime of the person proposed to be insured.

The policy in the Carrollton case, just cited, provided also:

> "That no claim shall be provable under it for a loss accruing prior to the payment of the premium even though the policy has been delivered prior to such payment."

The court says, at page 27:

> "Thus the application was made in Kentucky, the policy was accepted in Kentucky and the premium was paid in Kentucky;"

and the payment of that premium was the *conditio sine qua non* to any liability arising upon the policy. From the previous quotation it will be seen that the last essential act was the payment of the premium and the court specifically holds that that act, being the last essential act necessary to

change the offer to insure into a contract of credit indemnity insurance, having taken place in the State of Kentucky, the contract was a Kentucky and not a New York contract.

An application of this doctrine to the case at bar, will make it clearly evident that the Circuit Court of Appeals for the Second Circuit adopts the reasoning and enforces the decision of this Honorable Court, as laid down in the Clements case cited. It follows, therefore, that the contract in the case at bar was completed in and is, without any possibility of question, an Illinois and not a New York contract.

To the same effect are the tests laid down in the following cases:

In *Bascom* vs. *Zediker*, 48 Neb. (*supra*), where the question was whether a note was usurious and this turned upon the further question of whether it was a New York or Nebraska contract. After certain preliminary negotiations which had taken place in the State of New York, it was agreed at the City of Troy, in the State of New York, that Banscom was to lend Zediker $10,000, for which Zediker was to execute his promissory note, drawing interest at 10 per cent per annum and pay Bascom a bonus of $100 for making this loan. Later, Zediker, then being in Grand Island, Nebraska, wrote Bascom, at Troy, N. Y., a letter in which he asked for the money for the purpose of getting certain stock of the First National Bank; stated the terms under which he was willing to borrow the money and added "write me here at Grand Island, I will be here until the last of the month." An answer was sent to this by Bascom's secretary, at Troy, N. Y., in which the announcement was made that upon certain conditions the loan would be made. Later, Zediker replied to that letter re-

stating the terms upon which he was willing to borrow and upon the same day wrote from Grand Island, Nebraska, a letter in which he said:

> "Herein find promissory note for $10,000 at 10 per cent. interest on one year's time signed by myself and "

The note was received by Zediker in New York, and in New York Zediker filled the date of September 13th in the note and transmitted to the cashier of the First National Bank of Franklin, Nebraska, the sum of $9,900, to be paid to Zediker on his delivering to said cashier for Bascom 100 shares of the capital stock of the First National Bank of Franklin, Nebraska. The stock was so delivered by Zediker to the cashier and the money paid over. The note sent was payable to Bascom at Troy, N. Y.

Upon this state of facts the court held that the contract, *i. e.*, the note was made in and governed by the laws of the State of Nebraska. This is only upon the theory that the signing of the note by Zediker (the maker) was the last essential act necessary to constitute the negotiable paper into the ordinary contract contained in and evidenced by a promissory note, and that said contract arose in the jurisdiction where that last essential act was performed.

It might possibly be argued that since Bascom was given authority to date the note and did date it in the State of New York, and that the note was incomplete until dated, that this would have made it a New York contract, but the dating of the note is no essential part of the contract, and it need not be argued here that the sending of a signed promissory note to the payee with the date left blank and with authority to the payee to fill in the date upon receipt of the note, does not constitute the dating of the note in any sense an act essential to cause the obligation under it

to arise and the court in this case adheres to the rule laid down *supra.*

In the case of *Shelton* vs. *Haxtun*, 91 N. Y., *supra*, the New York Court of Appeals laid down the same rule. The question there was a question of usury and turned upon whether the contract was made in New York or Illinois. Earl, J., writing the prevailing opinion of this court, says, at page 131:

> "The note was executed in Illinois at the place of defendant's residence, and expressed no place of payment, and was forwarded to the plaintiff in this state by mail. There was no evidence tending to show that there was any intention on the part of either of the parties to evade the usury laws of this state, and the note was manifestly executed with reference to the laws of the State of Illinois, where the maker resided, and where the laws authorized the rate of interest inserted in the note. The note was given in Illinois in exchange for a note there surrendered through the agency of the mail by the plaintiff to the defendant; and *when in pursuance of plaintiff's request this note was executed by the defendant and put in the mail, directed to him at his residence in this state, the contract between the parties was complete*, and the note then became the property of the plaintiff. If it had been lost in the mails it would have been lost as the property of the plaintiff, and he could, therefore, have sued the defendant thereon as upon a lost note. If it had been stolen from the mails, or unlawfully taken or converted, it could have been described in an indictment for the crime as the property of the plaintiff, or could have been recovered by him in an action of replevin, or sued for in an action of trover, claiming it as his property."

If Meyer had died after the acceptance of his application by the plaintiff in error in Chicago, Illinois, and before the

certificate sued on had been received by him in New York, his beneficiary could have unquestionably maintained an action upon the contract evidenced by the certificate.

Thus the New York Court of Appeals has laid down the rule that the place where the last essential act takes place, which act causes the liability upon the contract to arise, is the place, with reference to the law of which the contract is made, and by whose laws the contract is governed. The doctrine of this case, laid down by that court, makes the contract at bar, not a New York, but an Illinois contract, and with reference to the law of which latter jurisdiction, that contract was made.

In *McIntyre* vs. *Parks*, 3 Metc. (*supra*), it was held by the Supreme Court of Judicature of the Commonwealth of Massachusetts that where a proposal to purchase goods is made by a letter sent to another state and is there assented to, the contract of sale is made in the latter and not in the former state.

This is the rule for which we are contending in the case at bar.

And in *Milliken* vs. *Pratt*, 125 Mass. (*supra*), the same court held that a contract of guaranty signed in that commonwealth and sent by mail to another state, and *assented to and acted on, there*, for the price of goods sold there, *is made in the latter state.*

To the same effect:

Gay vs. *Rainey*, 89 Ill., 221.

Buchanan vs. *Drovers' Nat. Bank of Chicago*, 55 Fed. Rep., 223.

Western T. & C. Co. vs. *Kilderhouse*, 87 N. Y., 430.

Merchant vs. *Chapman*, 4 Allen, 362.

Sands vs. *Smith*, 1 Neb., 108.

Hosford vs. *Nichols*, 1 Paige's Ch., 220.

In *Bascom* vs. *Zediker* (*supra*), the court said, at pages 385-386:

> "A contract is made when it is finished, completed, consummated. In the case at bar the loan of Bascom to Zediker was not completed until the money was paid over to him by the cashier of the First National Bank at Franklin. By agreement between the parties Bascom was to remit, and did remit, the money to the cashier of the First National Bank of Franklin. He was to pay over the money to Zediker on the latter's delivery to him for Bascom certain of the capital stock of the bank. The contract, then, between Bascom and Zediker was consummated in Franklin, Nebraska, when the $10,000 of stock was delivered to the cashier and $9,900 money paid over by him to Zediker. The decree of the District Court is right and is affirmed."

Armstrong, et al., vs. *Best*, 112 N. C. (*supra*), was a case in which the question was as to the disability of a married woman to make a contract, and the court said it was well settled that if the contract had been made in the State of North Carolina her common-law disability would make it void. The plaintiffs insisted that the contract was made in Baltimore, Md., and quoted *Milliken* vs. *Pratt* (*supra*), and *Pattison* vs. *Mills*, 1 Dow. & Cl., 342, in which Lord LYNDHURST laid down the law as follows:

> "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them."

The court in the Armstrong case follows the rule that the last essential act determines the place of and the law governing the contract, but held that the ability to sue and be sued depended upon domicile and affirmed a judgment holding that the plaintiffs were not entitled to recover upon that ground.

In *Waldron* vs. *Ritchings*, 9 Abb. Pr. N. S. (*supra*), the court held, at page 367:

> "When negotiations for a contract are carried on between two parties living in different states, as in this case, partly by the interchange of letters and partly by the oral communications of an agent of one of the parties, the contract is made in the state or place where it first took effect so as to become of binding obligation upon both parties."

In the case at bar the contract took effect upon the acceptance of the application by the executive authority of the plaintiff in error, to-wit, its board of control, and, on this record, that is shown to have been at Chicago, Illinois.

We are irresistibly led to the conclusion, therefore, that the contract at bar is an Illinois contract, that it is made with reference to the laws of that state, and that

(*a*) The evidence rejected at the trial is admissible without the waiver and

(*b*) The waiver is entirely effective and the exceptions to its rejection must be sustained, the judgment reversed and a new trial ordered.

And where (as in the case at bar) a proposal is made by a person residing in the State of New York, to a corporation having its residence in the State of Illinois, and is in Illinois accepted, the *place of acceptance* and not the place of proposal *is the place of the contract.* The contract is deemed, in law, to be made at the latter place, with a view to the incorporation therein of that (*i. e.*, the Illinois) law, and is in all respects and for all purposes an Illinois contract.

Farmers', etc., Sav. Co. vs. *Bazore*, 67 Arks., 252.

Zeltner vs. *Irwin*, 25 App. Div., 228.

Milliken vs. *Pratt*, 125 Mass., 374 (*supra*).
Baum vs. *Birchall*, 150 Pa. St., 164.

And where, by the terms of the offer, it is not to become a contract until accepted, the place of acceptance is the place of the contract. This is elementary and results from the fundamental nature of every contract.

And it will be presumed that the contract is to be performed at the place where it is made (*i. e.* Chicago, Illinois), and is to be governed by the law of Illinois, unless there is something in the *terms* of the contract, or in the explanatory circumstances of its execution inconsistent with that intention. This has been held by a long line of eminent authorities.

Toledo First Nat. Bank vs. *Shaw*, 61 N. Y., 294.
Liverpool, etc.. Steam Co. vs. *Phenix Ins. Co.*, 129 U. S., 448.
Pritchard vs. *Norton*, 106 U. S., 124.
Lloyd vs. *Guibert*, L. R. Q. B., 115.
Lewis vs. *Headley*, 36 Ill., 433.
Smith vs. *Mead*, 3 Conn., 353.
DeSobry vs. *De Laistre*, 3 Am. Dec., 535.
Tillinghast vs. *Boston, etc., Lumber Co.*, 39 S. C., 484.
Fisher vs. *Otis*. 3 Pin. (Wis.), 78.
Hilliard vs. *Outlaw*, 92 N. C., 266.
Kittle vs. *Delamater*, 3 Neb., 325.
Young vs. *Harris*, 14 B. Mon. (Ky.), 447.
Hyatt vs. *State Bank*, 8 Bush., 193.
Philadelphia Loan Co. vs. *Towner*, 13 Conn., 357.

(*a*) There is nothing in the terms of the contract providing for performance at any other place than the home

office of the defendant in the City of Chicago, in the County of Cook, in the State of Illinois.

Application (Rec., fols. 152-163).

Benefit Certificate (Rec., fols. 145-150).

Moreover, in the nature of the contract, there could be no specified place of performance if performance be deemed to be the delivery of the money due under the obligation at maturity, and the acceptance of the surrendered certificate, for then the place wheresoever upon this earth the beneficiary, at the time of maturity, might be, would have to be the place of performance.

As it is impossible for the parties to know or contemplate where that place might be, it is impossible from this point of view to say at the inception of the contract that there is any specific or particular place of performance, or that any particular or specific place was in the contemplation of the parties.

If, on the other hand, and this is the only reasonable and possible construction of the terms of the contract, *performance is accomplished when the plaintiff in error accepts, as satisfactory, the proofs of death*, acknowledges the performance of the conditions, and sends to the beneficiary, wheresoever the beneficiary may be found, *from out its home office in the City of Chicago, in the State of Illinois, the covenanted sum, then the place of performance* by the terms of the contract, by its only possible interpretation *is within the jurisdiction of the State of Illinois.*

We, therefore, respectfully urge that this contract, which arose in Illinois, was to be performed in Illinois, and we are unaware of any decision in the law, whether of the State of New York or any other state of the United States, whether by the Federal Courts or the courts of the mother of the common law, or under the civil law, or under the decisions

rendered under any system of law which has ever obtained among civilized people, under which this contract can be held or deemed to be anything else than *an Illinois contract.*

(*b*) Not only are there no explanatory circumstances in the execution of the contract, inconsistent with the intention to make the place of performance the place of acceptance, but there are good and controlling reasons inherent in the nature of the plaintiff in error's organization and the beneficent work it is doing, in furnishing cheap insurance to those otherwise unable to obtain any protection, and in the contract at bar, which make it definite and certain that the place of performance is the place of origin and *the law with regard to which the contract was made*, the law of the home office of the defendant, *the law of the State of Illinois.*

The plaintiff in error insures its members *in all of the states* of the American Union, in each of its territories and the District of Columbia, in each of the provinces of Canada, in British Columbia, in Mexico, in Cuba and in the Hawaiian Islands.

Were the law applicable to the construction of the contract to be *lex fori*, there would be as many kinds of contracts between each member and his fellow members as there are jurisdictions where their beneficiaries chose to sue. If this court shall declare the law in favor of the defendant in error, it will only be necessary for claimants living in Illinois and other jurisdictions, which are not complaisant to the violators of their solemn contractual obligations to society and other moral perverts, to assign their claims to residents of the State of New York, and use the courts thereof to work injustice upon their fellow members.

Yet justice, equity and fair dealing to all require that all these contracts should be construed alike, by means of the

same body of law, under uniform principles of construction and subject to the same rules of interpretation and evidence. The interests of justice and equity require that they shall all be deemed as made in view of one body of law (not that the wildest conflict shall exist, so that a clause enforced in one jurisdiction shall be nullified in another, and there be no common rights, duties or obligations). It is with a view to this necessity that the defendant closes all of its contracts in the one place—Chicago—and they are all made with reference to one law—that of Illinois.

These contracts rest on like obligations. The rates are the same to all. Should it have to pay in suicide cases more than the stipulated amount in New York, and only the covenanted sum in Illinois, the burdens are unequally placed and equity has not been done.

The interpretation of the contract, and of the rights and obligations of the parties thereto, are regulated by the law prevailing at the place of performance, and how much more is this true when the place of performance is the place of execution.

St. Nicholas Bank vs. *State Nat. Bank*, 128 N. Y., 26.

Jewell vs. *Wright*, 30 N. Y., 259.

Dickinson vs. *Edwards*, 58 How. Pr., 24.

Scudder vs. *Union Nat. Bank*, 91 U. S., 406.

Cox vs. *U. S.*, 6 Pet., 172.

Morris vs. *East Side Car Co.*, 104 Fed. Rep., 409.

Sandham vs. *Grounds*, 94 Fed. Rep., 83.

Martin vs. *Roberts*, 36 Fed. Rep., 217.

Don. vs. *Lippmann*, 5 Cl. & F., 1.

Ferguson vs. *Fyffe*, 8 Cl. & F., 121.

Shoe, etc., Nat. Nank vs. *Wood*, 142 Mass., 563.

Akers vs. *Demond*, 103 Mass., 323.

Brown vs. *Camden, etc., R. Co.*, 83 Pa. St., 316.
Waverly First Nat. Bank vs. *Hall*, 150 Pa. St., 466.
Baum vs. *Birchall, supra.*
Fitzsimons vs. *Guanahani Co.*, 16 S. C., 192.
Robinson vs. *Queen*, 87 Tenn., 445.
Cartwright vs. *New York, etc., R. Co.*, 59 Vt., 675.
Hanrick vs. *Andrews*, 9 Port (Ala.), 9.
Belmont vs. *Cornen*, 48 Conn., 342.
Vermont State Bank vs. *Porter*, 5 Day (Conn.), 322.
Herschfeld vs. *Dexel*, 12 Ga., 582.
Greenwald vs. *Freese*, 34 Pac. Rep., 73.
Lewis vs. *Headley, supra.*
Guignon vs. *Union Trust Co.*, 156 Ill., 135.
Lowy vs. *Andrews*, 20 Ill. App., 521.
Abt vs. *American Trust, etc., Bank*, 159 Ill., 467.
People's Bldg. Co., etc., Assn., vs. *Fowble*, 17 Utah, 122.
Stevens vs. *Gregg*, 89 Ky., 461.
Boyd vs. *Ellis*, 11 Ia., 97.
Arnold vs. *Potter*, 22 Ia., 194.
Alexandria, etc.. R. R. Co. vs. *Johnson*, 61 Kan., 417.
Capryn vs. *Adams*, 28 Md., 529.
Marburg vs. *Marburg*, 26 Md., 8.
Jordan vs. *Fitz*, 63 N. H., 227.
Whitney vs. *Whiting*, 35 N. H., 462.
Thayer vs. *Elliott*, 16 N. H., 102.
Dyer vs. *Hunt*, 5 N. H., 401.
Knox vs. *Gerhausen*, 3 Mont., 275.
Shacklett vs. *Polk*, 51 Miss., 378.

Hart vs. *Livermore Foundry, etc., Co.*, 72 Miss., 809.

Reg. vs. *Ogilvie*, 6 Can. Exch., 21.

As, in the case a bar, the last essential act to complete the contract was the acceptance of the application, and, as this was done, and could only be done by the terms of the offer contained in the application, by the board of control, at Chicago, Illinois, it is in that place, under all the authorities, that the contract arose. The conclusion is irresistible that this is an Illinois contract, made with reference to the laws of Illinois, and to be by them construed.

The essential vice of the argument contained in the opinion of Mr. Justice GRAY and concurred in by the entire Court of Appeals of New York, in determining this case is that it utterly ignores the terms of the offer upon which the contract in suit was based.

The application provided for the acceptance in Chicago of the offer therein contained. The offer was accepted in Chicago, as appears by the language of the benefit certificate. The instruments speak for themselves.

Nothing then remained to be done.

Forty acceptances might be endorsed upon the benefit certificate and they could not have any effect to change the very elementary proposition of law that *the acceptance of an offer in the terms in which it is made* between parties capable of contracting, with regard to subject-matter capable of being contracted about, where consideration exists, *consummates a contract* and fixes the contractual rights and liabilities of the parties.

The Effect of these Decisions on the Case at Bar.

It has never been doubted that an executory (bilateral) contract (when there is a contract as in the case at bar) is within the protection of the non-impairment clause.

15 Ency. of Law, 2d Ed., 1033.

The contract was supported, as was each part of it, and especially the clause in question here, by ample consideration. It is therefore within the federal constitution's protection.

Idem, 1039, note 8.

It will be asked: What is the obligation which the plaintiff in error claims the statute (section 834, Code of Civil Procedure of the State of New York) impairs?

The following authorities will define this:

Sturges vs. *Crowninshield*, 4 Wheaton, 197.
McCracken vs. *Hayward*, 2 How., 608.

In the very early case of *Sturges* vs. *Crowninshield*, *supra*, MARSHALL, C. J., thus defines it:

> "A contract is an agreement in which a party agrees "to do or not to do a particular thing. The law binds "him to perform his obligation, and this is, of course, "the obligation of his contract."

And in *McCracken* vs. *Hayward*, 2 How., 608, BALDWIN, J., speaking for the court, said:

> "The obligation of a contract consists of its binding "force on the party who makes it. This depends on "the laws in existence when it was made. These are "necessarily referred to in all contracts, and form a "part of them, as the measure of the obligation to per- "form them by the one party and the right acquired "by the other."

But what law can here be referred to, or possibly meant, but the law of the place where the contract had its inception and within whose jurisdiction it took its birth? We have shown that jurisdiction to be the State of Illinois. We will refer to the decisions there on the questions at issue, and to the common law of this state as evidence of it.

In the case last cited Mr. Justice BALDWIN further says:

> "If any subsequent law (by which the court must "necessarily mean any law substantially enacted or in- "jected in any way therein) affect to diminish the duty "or impair the right it necessarily bears on the obliga- "tion of the contract in favor of one party to the injury " of the other; hence any law which in its operation "amounts to a denial or obstruction of the rights accru- "ing by a contract, though professing to act only on "the remedy, is directly obnoxious to the prohibition of "the constitution."

What, then, becomes of section 834 of the Code of Civil Procedure of this state when attempted to be injected into an Illinois contract, and what of section 836 purporting to deny validity to the waiver contained in said contract if valid under the *lex loci celebrationis?*

Calling this a statute of remedy and not of right does not change the matter, nor benefit the defendant in error, for it is in its essence the denial of a substantial right of the plaintiff in error under, pursuant to, of the substance and of the essence of the contract in question; the right of the plaintiff in error to enforce, and the obligation of the defendant in error to permit the testimony of the physicians, and particularly of Dr. Bruso, erroneously excluded upon the trial.

This is an Illinois contract, for it arose in, was made in, and absolutely completed in, Illinois. The certificate was made, signed and sealed in Illinois (Rec., fol. 149), and that

this contract *should be made in* Illinois is one of the terms of the offer made by Emanuel Meyer to the plaintiff in error to accept him as a member of its endowment rank and enter with him into the contract now in suit (Rec., fol. 161). The issuance of the certificate is the necessary and sufficient evidence of the acceptance of the application—is the last act to be done in the making of the contract. This document pleaded by and introduced in evidence by the defendant in error, speaks for itself, and proclaims the transmutation of the offer contained in the application into the contract arising by its acceptance, to have taken place at the City of Chicago, in the State of Illinois.

It having been shown that this is an Illinois contract, the next question to which we respectfully direct the attention of the court is, what was the law of Illinois at the time of the making of the contract at bar? There are two sources from which this court may discover the same:

(*a.*) It may test the question by an examination of the Illinois decisions upon this question or

(*b.*) Assume the common law of Illinois to be the same as the common law of New York, and examine the question in the light of that law, in accordance with the well settled rule.

It will be found that, tried by either test, the evidence excluded was admissible under the contract, and its exclusion over the plaintiff in error's exceptions requires the reversal of the judgment complained of.

Waldron vs. *Ritchings*, 9 Abb. Pr. N. S., 359.
White vs. *Delafield*, 23 Barb., 498.

Communications from a patient to his physician were not privileged at common law.

23 Ency. of Law, 83,

and the following authorities grouped under their several jurisdictions hold that proposition to be true:

NEW YORK.

Edington vs. *Aetna Life Ins. Co.*, 77 N. Y., 564.
People vs. *Stout*, 3 Park, Crim. Rep., 670.
Kendall vs. *Grey*, 2 Hilton, 300.

ENGLAND.

Rex vs. *Gibbons*, 1 C. & P., 97.
Brown vs. *Carter*, 9 L. C. Jur., 163.
Kingston's Case, 20 How. State Trials, 572.
Broad vs. *Pitt*, 3 C. & P., 518.
Wheeler vs. *LeMarchant*, 17 Ch. D., 675.

CONNECTICUT.

Goddard vs. *Gardner*, 28 Conn., 172.

INDIANA.

Springer vs. *Byram*, 137 Indiana, 15.

IOWA.

Winters vs. *Winters*, 102 Iowa, 53.

MASSACHUSETTS.

Barnes vs. *Harris*, 7 Cush., 577.

MICHIGAN.

Campau vs. *North*, 39 Mich., 606.

MONTANA.

Territory vs. *Corbett*, 3 Montana, 50.

TEXAS.

Steagald vs. *State*, 22 Tex. App., 464.

WISCONSIN.

Boyle vs. *N. W. Mut. Relief Assn.* ,95 Wis., 312;
In re Bruendl, 102 Wis., 45;

and while it is true that statutes have been enacted in some jurisdictions forbidding the disclosure of evidence, against the will of the patient, of information acquired by physicians in their professional capacity, those statutes can only be construed as part of and read into contracts made within the territorial jurisdiction where those statutes are enacted.

As far as the plaintiff in error has been able to learn by an examination of the statutes of the various jurisdictions which administer the common law and take their jurisprudential system from the fountain head of the common law are the following in this country:

California,
Colorado,
Indiana,
Iowa,
Kansas,
Michigan,
Missouri,
Montana,
New York,
Pennsylvania,
Wisconsin,

in which there are statutes which affect the admissibility as evidence of communications made to a physician.

Certain it is, however, that an exhaustive search of the statutes of the State of Illinois, where this contract was made, reveals no statutory prohibition or even regulation concerning the testimony or other evidence of physicians or surgeons in cases of the kind at bar.

The common law obtains in that jurisdiction as it existed in England prior to the fourth year of James the First, and it is, therefore, respectfully urged that the evidence ruled out against the plaintiff in error's exceptions was admissible, entitled it to a verdict in its favor, at the hands of the jury, and that the judgment must be reversed for the aforesaid errors.

There is not a single decision nor even an expression *obiter* by any court sitting within the boundaries of the State of Illinois, high or low, of record or not of record, of first resort or last resort, or of intermedate appellate jurisdiction, which has in any way, shape or form at any time from the admission of Illinois as a state within this Union to the present day, ruled out the material and relevant evidence of any physician, surgeon or other medical man in any kind of case or proceeding as incompetent.

The law of Illinois is, therefore, that the evidence is admissible.

By the common law the evidence was admissible and if we are to test that common law by the common law of the State of New York, we have already shown that fact by the decisions *supra*. If it is to be tested by the decisions of the courts of Illinois and the statute law of that state, then we respectfully urge that an entire absence of statutory prohibition or regulation accompanied by as equally an absolute silence on the part of its courts, *leads to the irresistible conclusion that the evidence is admissible by the law of the State of Illinois.*

"We are irresistibly led to the conclusion, therefore, that the contract at bar is an Illinois contract, that it is made with reference to the laws of that state, and that

"(*a*) The evidence rejected at the trial is admissible without the waiver, and

"(*b*) The waiver is entirely effective, and the exceptions to its rejection must be sustained, the judgment reversed and a new trial ordered."

In the absence of proof to the contrary, the common law will be presumed to be in force in a sister state, unless there is evidence in the record to the contrary.

It is the general rule throughout the United States that, in the absence of proof as to the laws of a sister state, it will be presumed that the common law exists there, and according to the weight of authority, no presumption arises that other countries or states have adopted any of the statute laws of the domestic forum.

Davis vs. *Garr*, 6 N. Y., 124.

White vs. *Knapp*, 47 Barb., 549.

Throop vs. *Hatch*, 3 Abb., Pr., 23.

Wright vs. *Delafield*, 23 Barb., 198.

Leonard vs. *Columbia Steam Nav. Co.*, 84 N. Y., 48.

McDonald vs. *Mallory*, 77 N. Y., 547.

Crowley vs. *Panama R. R. Co.*, 30 Barb., 90.

Beach vs. *Bay State Steamboat Co.*, 30 Barb., 433.

Van Deventer vs. *N. Y., etc. R. R. Co.*, 27 Barb., 244.

Whitford vs. *Panama R. R. Co.*, 23 N. Y., 465.

McCulloh vs. *Norwood*, 58 N. Y., 567.

Dunn vs. *Adams*, 1 Ala., 527.

Atchison etc., R. R. Co. vs. *Betts*, 10 Col., 431.

Langdon vs. *Young*, 33 Vt., 136.

Murphy vs. *Collins*, 121 Mass., 6.

Kelley vs. *Kelley*, 161 Mass., 111.

Hull vs. *Augustine*, 23 Wis., 383.

Flato vs. *Mulhall*, 72 Mo., 522.

Davis vs. *Bowling*, 19 Mo., 651.

Crouch vs. *Louisville, etc., R. R. Co.*, 42 Mo. App., 248.

Morrisey vs. *Wiggins Ferry Co.*, 47 Mo., 521.

Stout vs. *Wood*, 1 Blackf., 71.

Carpenter vs. *Grand Trunk R. R. Co.*, 72 Me., 388.

Ellis vs. *Maxson*, 19 Mich., 186.

Kermo vs. *Ayer*, 11 Mich., 181.

People vs. *Lambert*, 5 Mich., 349.

The case of *Stout* vs. *Wood* (*supra*), was an action for slander, based upon words which are actionable under the statute law of the forum, but not at common law, and which were spoken in another state. It was held in this case that the action could not be maintained without proof of a statute of the state where the words were spoken, making them actionable "because," says the court, "There "is no presumption that the statute law of the state where "the words were spoken is the same as that of the forum."

To the same effect is *Langdon* vs. *Young* (*supra*), and *Leonard* vs. *Columbia Steam Nav. Co.* (*supra*), in which latter case MILLER, J., writing the opinion, says, at page 52:

> " * * * The right to recover in such cases rests upon the presumption that the common law prevails in such other state, and that the injured party could have recovered there had the action been brought in such state. The remedy in such cases is given by the courts of one country or state upon the principle of comity which is due by one sovereign state or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this state, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this state but

in a foreign country unless it is proved that the laws of the country are of a similar character. (Citing cases, *supra.*)"

In *Waldron* vs. *Ritchings*, 9 Abb. Pr., N. S., 369, *supra*, it was held that a married woman's legal incapacity *is presumed* to be the same in another state as it was in New York, *prior to the enabling statutes.*

Three very instructive decisions by the Supreme Court of Michigan, are:

Kling vs. *Fries*, 33 Mich., 275.
Roethke vs. *Phillip Best Brewing Co.*, *ibid.*, 340.
Webber vs. *Donnelly*, *ibid.*, 469.

In these cases it was held that as against the validity of a contract it will not be presumed that the statutes of another state are, like those of the forum, in derogation of the common law.

In the absence of proof, the presumption always is that the common law exists in sister states, taking their origin either

(*a.*) As colonies of the British Empire, or

(*b.*) Those states settled by the citizens of such colonies or organized out of their territory.

This court will take judicial notice of the historic fact that Illinois was carved out of the Northwest territory, belonging to the State of Virginia; and of the further historic fact that Virginia was a royal colony which had adopted the common law, and that, therefore, the common law exists (as it does in point of fact) in the daughter of Virginia, *i. e.*, the State of Illinois. This doctrine has been held not alone in the State of New York and in the Federal courts, but in a number of states of the Union.

We cite the cases under the several jurisdictions in which they were decided:

NEW YORK.

Vanderpoel vs. *Gorman*, 140 N. Y., 563.
Whitford vs. *Panama R. R. Co.*, *supra*.
Harris vs. *White*, 81 N. Y., 544.
Seymour vs. *Sturgess*, 26 N. Y., 134.
Starr vs. *Peck*, 1 Hill, 270.
Abell vs. *Douglass*, 4 Den., 305.
White vs. *Knapp*, *supra*.
Throop vs. *Hatch*, *supra*.
Savage vs. *O'Neil*, 42 Barb., 374.
Wright vs. *Delafield*, *supra*.

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Pyeatt vs. *Powell*, 51 Fed. Rep., 551.

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Merritt vs. *Merritt*, 20 Ill., 65.
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Marshall vs. *Betner*, 17 Ala., 836.
Averett vs. *Thompson*, 15 Ala., 678.
Ellis vs. *White*, 25 Ala., 540.
Shepherd vs. *Nabors*, 6 Ala., 631.
Goodman vs. *Griffin*, 3 Stew., 160.
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Thorn vs. *Weatherly*, 50 Ark., 237.
Hydrick vs. *Burke*, 30 Ark., 124.
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Alford vs. *Baker*, 53 Ind., 279.
Mendenhall vs. *Gately*, 18 Ind., 149.
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Johnson vs. *Chambers*, 12 Ind., 112.
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Miles vs. *Collins*, 1 Met., 308.

MASSACHUSETTS.

Commonwealth vs. *Graham*, 157 Mass., 73.
Ufford vs. *Spaulding*, 156 Mass, 65.
Thurston vs. *Percival*, 1 Pick., 415.

MICHIGAN.

Roethke vs. *Philip Best Brewing Co.*, *supra.*
Hutchins vs. *Kimmell*, 31 Mich., 133.
Ellis vs. *Maxson*, *supra.*

MINNESOTA.

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MISSOURI.

Burdict vs. *M. P. R. R. Co.*, 123 Mo., 221.
Benne vs. *Schnecko*, 100 Mo., 250.
State vs. *Clay*, 100 Mo., 571.
Meyer vs. *McCabe*, 73 Mo., 236.
Morrisey vs. *Wiggins Ferry Co.*, *supra.*
Lucas vs. *Ladew*, 28 Mo., 342.
Am. Oak Leather Co. vs. *Wyeth Hardware etc., Co.*, 57 Mo. App., 287.
Kratz vs. *Preston*, 52 Mo. App., 251.
Roll vs. *St. Louis, etc,, Smelting, etc., Co.*, 52 Mo. App., 60.

OREGON.

Cressey vs. *Tatom*, 9 Ore., 545.

PENNSYLVANIA.

Brown vs. *Camden, etc., R. R. Co.*, 83 Pa. St., 316.

TEXAS.

Mexican Cent. R. R. Co. vs. *Mitten*, 13 Tex. Civ. App., 653.

The case of *Roll* vs. *St. Louis, etc., Co.*, 52 Mo. App., 60 (*supra*) holds that *the common law is presumed to be in force in the State of Illinois in the absence of proof to the contrary.*

The case of *Kratz* vs. *Preston*, 52 Mo. App., (*supra*), held that in the absence of proof to the contrary, the common law was presumed to be in force in the Commonwealth of Pennsylvania, and in the case of *Am. Oak Leather Co.* vs. *Wyeth, etc., Co.*, 57 Mo. App., (*supra*), the court held that the common law is, in absence of proof to the contrary, presumed to be in force in the State of Michigan.

In the case of *Harris et al.* vs. *White* (81 N. Y., *supra*), FOLGER, Ch. J., writing the unanimous opinion of the court says, at page 544:

> "* * * *If the common law prevails in the other state* in which by contract the plaintiffs agreed to drive the defendant's horses, then that contract was not illegal by the law of those states, and *the statute law of this state may not run over its borders into those states and with it carry thither the public policy of this state.* The defendant has made no proof of what is the law of those states on this subject; he has not even pleaded that by that law this contract was illegal (*Cutler* vs. *Wright*, 22 N. Y., 472). As a general rule courts of one state, in the absence of proof and allegations otherwise, will presume that the laws of another state are like those of their own state. It is doubted, however, whether this presumption will be made of statute law

(*McCulloch* vs. *Norwood*, 58 N. Y., 567; *Wilcox Co.* vs. *Green*, 72 *id.*, 17). It will not be made of statutes imposing a penalty or forfeiture. And it has been declared that a court can not take notice judicially of any laws of other states not according to the common law (*Holmes* vs. *Broughton*, 10 Wend., 75)."

Applying this case to the case at bar, is it not clear beyond controversy that this Honorable court will presume the law of Illinois in the absence of proof to be what the common law of New York was with respect to the Illinois contract in suit before the statute changed the common law? And will not this Honorable court out of its abundant learning, judicially know what that common law is, that the evidence in this case excluded over the plaintiff in error's exceptions,upon the objection of the defendant in error was admissible and its exclusion by the learned trial court highly prejudicial to the plaintiff in error and reversible error?

In the case of *Whitford* vs. *The Panama R. R. Co.*, 23 N. Y. (*supra*), DENIO, J., said at page 468:

"* * * *And where the condition of a law of another state becomes material, and no evidence has been offered concerning it, our courts will presume that the general principles of the common law, which we always consider to be consonant to reason and natural justice, prevail there. But no such presumption obtains respecting the positive statute law of the state. There is generally no probability, in point of fact, and there is never any presumption of law that other states or countries have established, precisely or substantialty, the same arbitrary rules which the domestic legislature has seen fit to enact.*"

In the case of *Starr* vs. *Peck*, 1 Hill (*supra*), the court, by COWEN, J., said, at page 272:

"But it is true that the parties had power to contract marriage *inter se* before the husband went to sea without the intervention of a clergyman (*Fenton* vs. *Reed*, 4 John Rep., 52). *Such is the common law, which we must presume was the law of Connecticut at the time in the absence of proof to the contrary.*"

In *Seymour* vs. *Sturgess*, 26 N. Y., 134, ALLEN J., writing the opinion of the court, says at page 139:

"* * * We have so much of the charter as the plaintiff has seen fit to set out in his complaint, and in it there is nothing to charge the stockholders, and the charter itself was not put in evidence, nor any general law of the state of Maryland *upon any subject. The common law, therefore, must determine the liability of the parties* (*Holmes* vs. *Boughton*, 10 Wend., 75; *Thorp* vs. *Hatch*, 3 Abb. Pr., 23; 1 Kent Com., 472)."

In *Vanderpoel* vs. *Gorman*, as sheriff, etc. (140 N. Y., 563; *supra*), which was an action brought by plaintiff as substituted assignee for the benefit of the creditors of the North River Lumber Company to recover from the defendant the value of certain property, levied on by him as sheriff of the County of New York, by virtue of certain attachments against the corporation. PECKHAM, J., writing the opinion of the court, said, at page 568:

"There can be no doubt that an insolvent corporation could at common law make a general assignment in trust to an assignee for the benefit of its creditors (*Haxtun* vs. *Bishop*, 3 Wend., 13; *DePuyster* vs. *Trustees of St. Peter's Church*, 3 Barb. Ch., 119, 124; s. c. on appeal, 3 N. Y., 238; 2 Mor. on Corp., §802 and note). Under the law of New Jersey, in which state the corporation was created, its right to make an assignment of this nature seems to be established (*Wilkinson* vs. *Bauerle*, 41 N. J., Eq., 635). *At any*

rate no statute of New Jersey prohibiting such an assignment was proved by defendant, and we can not presume that the common law has been altered in New Jersey upon this subject without some proof to that effect."

Upon the authorities selected from the great number we have cited, there is absolutely no question but what the absence of proof of the *lex loci celebrationis* requires that we should apply the presumption well nigh universal in the mother country and this, and exercised by the Honorable Court of Appeals of New York repeatedly, *that the law governing the contract is the common law and that the evidence in question was admissible.*

Moreover, the very absence of statutory regulation or prohibition in the State of Illinois and the very silence of its courts upon the main issue leaves to the defendant in error the burden and duty of showing, if she can, what it is respectfully urged she can not do, that under the *lex loci celebrationis* the evidence was not admissible. She has neither sustained nor attempted to sustain that burden.

He who seeks to vary the foregoing rule has the burden of proving the variance. In this the defendant in error utterly failed. No scintilla of evidence was offered upon the trial to show that the waiver in question was prohibited, made ineffective, or was insufficient under the law which governed the contract and with reference to which the same was made.

AND FOR THE VERY BEST REASON POSSIBLE. THERE WAS NO SCINTILLA OF EVIDENCE OFFERED BY THE DEFENDANT IN ERROR UPON THE TRIAL IN DEROGATION OF THE COMMON LAW IN ILLINOIS, BECAUSE NONE SUCH, IN FACT, EXISTS.

POINT THREE.

A Federal question having been made and this cause being properly in this court under the writ of error allowed herein, the entire record is to be examined, and if reversible error has been committed, the judgment must be reversed.

Burton vs. *United States*, October, 1904, Term, 343, decided January 16, 1905.

Horner vs. *United States*, 140 U. S., 570, at 576, 577.

See same, 36 L. Ed., 266.

See same, 12 Sup. Ct. Rep., 522.

Act of March 3, 1891, Sec. 5, U. S. R. S., Sec. 709.

In the case of *Joseph Ralph Burton, plaintiff in error*, vs. *United States, supra*, the plaintiff in error having been convicted in the District Court of the United States for the Eastern District of Missouri, of a violation of the Revised Statutes of the United States, section 1782, brought his case directly to the Supreme Court from that court upon a writ of error. A number of errors were assigned by Senator Burton in the proceedings below, and Mr. Justice PECKHAM, delivering the opinion of this Honorable court, said:

"Counsel for the defendant base their right to ob-
"tain a direct review by this court of the judgment of
"conviction in the District Court of Missouri upon the
"contention that the case involves the construction and
"applicatian of the Constitution of the United States in
"several particulars. They insist that under Article 3,
"Sec. 2 of the Constitution, and also under the 6th
"Amendment of the same, the defendant was entitled
"to be tried by a jury of the state or district in which

"the crime alleged against him in the indictment was "committed. This question arises by reason of those "counts of the indictment which charge the receipt by "defendant of various checks therin set forth, at St. "Louis, in the State of Missouri, while the evidence in "the case shows, without contradiction, that the checks "were received in the City of Washington, D, C., and "payment thereof made to defendant by one of the "banks of that city. Counsel contended that if any "crime were committed by the receipt of these checks "and the payment thereof to the defendant [which is "denied], that crime was committed in Washington, "and not in Missouri, and that it did not come within "Sec. 731 of the Revised Statutes of the United States "(U. S. Comp. Stat., 1901, p. 585), providing that "when an offense against the United States is begun "in one judicial circuit, and completed in another, it "shall be deemed to have been committed in either, "and may be dealt with, etc., in either district, in the "same manner as if it had been actually and wholly "committed therein. Counsel for defendant also contend "that the case involves the construction and application "of Sec. 6 of Article 1 of the Constitution of the United "States, providing that senators and representatives "shall, in all cases except treason, felony and breach of "the peace, be privileged from arrest during their at- "tendance at the sessions of their respective houses, "and in going to and returning from the same. These "questions were raised in the court below. Whether "the defendant waived his alleged privilege of freedom "from arrest as senator would probably depend upon "the question whether the offense charged in substance "a felony, and if so, was that privilege a personal one "only, and not given for the purpose of always secur- "ing the representation of a state in the senate of the "United States. However that may be, the question

"is not frivolous, and in such case the state grants to "to this court jurisdiction to issue the writ of error "directly to the District Court, and therein to decide "the case without being restricted to the constitutional "question. *Horner* vs. *United States*, 143 U. S., 570, "36 L. Ed., 266, 12 Sup. Ct. Rep., 522. It is not the "habit of the court to decide questions of constitutional "nature unless absolutely necessary to a decision of the "case. Having jurisdiction to decide all questions in "the case on this writ of error, we deny the motion for "a *certiorari* and proceed to an examination of the "record."

Mr. Justice Harlan, who alone dissented from the majority opinion of the court, does not dissent from these views, and it may therefore be taken as the unanimous opinion of this Honorable court, that a federal question, which is not frivolous, gives the plaintiff in error the right under the statute to a writ of error to this court; gives this court jurisdiction to issue the writ of error and then to decide the case without being restricted to the constitutional question.

In other words, the writ of error in the case at bar was properly sued out, providently allowed and the entire record is now before your Honorable court to determine whether justice, according to law, has been done between the parties in the premises.

In the case of Horner against the United States. 143 U. S., 570, in which Horner took an appeal to this court from an order dismissing the writ of habeas corpus and remanding him to the custody of the marshal, Mr. Justice BLATCHFORD, writing the unanimous opinion of this court, said at page 576:

"It is contended on the part of the United States "that, as the appeal in this case was taken on Novem- "ber 17, 1891, after the act entitled 'An Act to estab-

"lish Circuit Courts of Appeal, and to define and regu-
"late in certain cases the jurisdiction of the courts of
"the United States, and for other purposes,' x. 517,
"passed March 3, 1891 (26 Stat., 826), went into effect,
"this court has no jurisdiction of this appeal and that it
"ought to have been taken to the Circuit Court of Ap-
"peals for the Second Circuit. But, as the constitu-
"tionality of Sec. 3894, as amended, is drawn in ques-
"tion, an appeal in this case lies directly to this court
"from the Circuit Court, under Sec. 5 of the Act of
"March 3, 1891, which gives such appeal 'in any case
"in which the constitutionality of any law of the United
"States * * * is drawn in question.' This is in
"accordance with our decision in *Nishimura Ekin* vs.
"*United States*, 142 U. S., 651, 658, 659, where it was
"said: 'As this case involves the constitutionality of a
"law of the United States, it is within the appellate
"jurisdiction of this court, notwithstanding the appeal
"was taken since the act establishing circuit courts of
"appeals took effect. Act of March 3, 1891, c. 517,
"Sec. 5; 26 Stat., 827, 828, 115.' We are further of
"opinion that where an appeal or writ of error is taken
"directly to this court under Sec. 5 of the Act of March
"3, 1891, in a case in which the constitutionality of a
"law of the United States is drawn, this court acquires
"jurisdiction of the entire case, and of all questions in-
"volved in it, and not merely of the question of the
"constitutionality of the law of the United States. This
"is shown by the fact that, under Sec. 5, where an ap-
"peal or writ of error is taken direct to this court, in a
"case in which the jurisdiction of the District Court or
"of the Circuit Court is in issue, it is specifically directed
"that 'the question of jurisdiction alone shall be certi-
"fied to the Supreme Court from the court below for
"decision,' but there is no kindred limitation prescribed
"in regard to any of the other cases in which jurisdic-

"tion in this Court of Appeals or writs of error is given "by Sec. 5."

Section 5 of the Act of March 3, 1891, being Chapter 517 of the Acts of the fifty-first congress, second session, is as follows:

"§ 5. That appeals or writs of error may be taken "from the District Courts, or from the existing Circuit "Courts, direct to the Supreme Court, in the follow- "ing cases: In any case in which the jurisdiction of "the court is at issue; in such cases the question of "jurisdiction alone shall be be certified to the Supreme "Court from the court below for decision.

"From the final sentences and decrees in prize "causes.

"In cases of conviction of a capital or otherwise in- "famous crime.

"In any case that involves the construction or ap- "plication of the constitution of the United States.

"In any case in which the constitutionality of any "law of the United States, or the validity or construc- "tion of any treaty made under its authority, is drawn "in question.

"In any case in which the constitution or law of a "state is claimed to be in contravention of the consti- "tution of the United States.

"Nothing in this act shall affect the jurisdiction of "the Supreme Court in cases appealed from the high- "est court of a state, nor the construction of the statute "providing for review of such cases."

This is the act construed in the foregoing cases. An examination thereof will show that it is only under the first subdivision, to-wit, in any case in which the jurisdiction of the court is in issue, that in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

This is the only limitation upon the power of this court to examine the record, and in the two foregoing cases which came up under other subdivision of this statute, this court has held that its power to examine the whole record and to reverse the judgment for error therein appearing, is not confined to the federal question involved.

Now Sec. 709 of the revised statutes of the United States, under which the writ of error in the case at bar is prosecuted by the plaintiff in error, reads as follows:

> "Sec. 709. A final judgment or decree in any suit "in the highest court of a state, in which a decision in "the suit could be had, where is drawn in question the "validity of a treaty or statute of, or an authority ex- "ercised under the United States, and the decision is "against their validity; or where is drawn in question "the validity of a statute of or an authority exercised "under any state, on the ground of their being repug- "nant to the constitution, treaties, or laws of the United "States, and the decision is in favor of their validity; "or where any title, right, privilege, or immunity is "claimed under the constitution, or any treaty or statute "of, or commission held or authority exercised under "the United States, and the decision is against the "the title, right, privilege or immunity specially set up "or claimed by either party under such constitution, "treaty, statute, commission, or authority, may be re- "examined and reversed or affirmed in the Supreme "Court upon a writ of error. The writ shall have the "same effect as if the judgment or decree complained "of had been rendered or passed in a court of the "United States; [and the proceeding upon the reversal "shall be the same, except that the Supreme Court "may, at their discretion, proceed to a final decision of "the case, and award execution, or remand the same to "the court from which it was removed].

"The Supreme Court may [reaffirm], reverse, modify "or affirm the judgment or decree of such state court, "and may, at their discretion, award execution, or re- "mand the same to the court from which it was re- "moved by the writ."

The writ of error in the case at bar, as appears on the face thereof, was allowed under the authority conferred by this section. It will be seen that there is no more limitation upon the powers of this Honorable Court to examine the complete record which comes up on writ of error allowed under this section than there is under Sec. 5 of the Act of March 3, 1891, outside of the first subdivision thereof. It is, therefore, the law that upon this writ of error it is the privilege, and we respectfully urge becomes the duty of this Honorable court to examine the record in this action, and, if the contentions of the plaintiff in error be correct, even though this Honorable court should determine that the federal question raised by the plaintiff in error was properly decided by the state court, to reverse the judgment and remand this case to the court whence it came for further proceedings not inconsistent with the opinion of this Honorable court.

The plaintiff in error, therefore, contends that it is entitled to a new trial before a jury of the county where the action was brought. That it is the duty of the trial court to admit in evidence the medical testimony offered upon the first trial and rejected. Upon such new trial it will be the duty of such jury to hear the said medical evidence, and upon their oaths as jurors, to determine whether or not Emanuel Meyer did in fact commit suicide.

The medical testimony naturally falls into two classes whose admissibility in this action of covenant must be examined separately. If the plaintiff in error is correct in its

contention that the sections of the New York Code of Civil Procedure are not part of this Illinois contract, and that the contract was not made subject to the provisions thereof, then all of the medical testimony, so far as relevant and material, must be read in evidence and received by the jury. But if this court shall hold that the contract is subject to those sections of the code, then arises what in the opinion of the learned Justice, GRAY, is called "the difficulty in this case," which, in his judgment, entitles the defendant to a new trial in this action, That is the exclusion of the evidence of Dr. Bruso.

No stronger argument upon this phase of this case can be made than that of the learned justice, which, because of its lucidity, absolute logic, emminent fairness, judicial tone and forensic reasoning, the plaintiff in error here adopts and begs leave to subjoin.

> "The difficulty in this case, which, in my judgment, "entitles the defendant to a new trial in the action, is "the exclusion of the evidence of Dr. Bruso, called as "a witness for the defendant, and asked to state a con- "versation had with Meyer, the deceased. This wit- "ness was a physician, having his office in the City of "Buffalo, in this State, near to the Iroquois Hotel. He "testified that in the early morning, one of the bell "boys of the hotel came for him, and, upon entering "one of the rooms, he found a man in the bed suffer- "ing from pain and vomiting. Objection being made "to his evidence, which was in the form of a deposi- "tion, the court put the question: 'Did this doctor "treat him?' The defendant's counsel replied: 'He "inserted something hypodermically into the man "against his wish.' The objection to the testimony was "sustained, the defendant excepted and the whole "deposition of the witness was excluded, under the "previous ruling of the court, that sections 834 and

"836 of the Code of Civil Procedure applied. From "the deposition, thus offered and excluded, it ap- "peared that the witness had a conversation with "Meyer, which was narrated, so far as material, as "follows: 'I asked him what he had been doing and "he told me it was none of my damned business, that "he didn't want me in there and he wanted me to get "out of there. * * * I looked around the room. " * * * I found * * * a box of "rough on "rats" * * * empty. * * * He told me he "had taken it * * * because he wanted to die " * * * he didn't want to get well * * * "he didn't want me to do anything. * * * I pre- "pared a hypodermic injection * * * and stimu- "lated him, so he would not die in the Hotel Iroquois. " * * * When I was going to give him the "hypodermic, he said, "You, [cursing him in foul "language] keep away from here. Didn't I tell you "to keep away?" I paid no attention to him and gave "him the hypodermic.' The witness, was then asked "if he knew what was the cause of the condition of "the man and he answered that it was arsenical "poisoning and that the symptoms evidenced it. The "deceased was immediately conveyed from the hotel "to the hospital, where he died soon afterwards. The "evidence of Dr. Bruso was deemed inadmissible "under the provisions of section 834 of the Code, "which prohibits a physician from disclosing 'any in- "formation which he acquired in attending a patient in a "professional capacity, and which was necessary to "enable him to act in that capacity.' The agreement "of the insured, contained in his application, which "waived for himself, his representatives and benefi- "ciaries, 'any and all provisions of law, now or here- "after in force, prohibiting * * * any physician " * * * attending me * * * from disclos-

"ing or testifying to any information acquired thereby,' "and which expressly consented to such testimony "being given in any suit, was held below to be in- "sufficient to meet the requirement of section 836 of "the Code, that the provisions of section 834 must be "expressly waived upon the trial by the personal repre- "sentatives of the deceased patient. Such a waiver "was refused at this trial. Our recent decision in "*Holden* vs. *Metropolitan Life Ins. Co.* (165 N. Y., "13), justified the ruling below upon the question of "the force of the waiver in the insurance contract. "Theretofore, it had been the rule to regard such a "waiver as a binding part of the contract of insurance "and, as such, available to the insurer in any action "upon the policy. (*Foley* vs. *Royal Arcanum*, 151 N. "Y., 196.)

"But was there disclosed that relationship of physi- "cian and patient between the deceased and Dr. Bruso "which made operative the prohibitory provisions of "section 834? As the inadmissibility of such testi- "mony is only because of the statute, it is quite im- "portant that the case should come very clearly within "its terms, however liberal the construction which we "should give to an enactment intended to promote the "ends of justice. The object of this legislation was to "render privileged what communications are made "between a physician and his patient; but, obviously, "it is essential that it shall appear that the person at- "tended is his patient, in the sense in which such a term "is ordinarily understood. In *Griffiths* vs. *Metropolitan* "*Street Railway Company*, (171 N. Y., 106), we, "quite lately, had occasion to consider such a question "under a state of facts, not essentially, dissimilar to "that now before us. In that case the plaintiff brought "his action to recover damages for injuries sustained "through the negligence of the defendant's servant, a

"gripman upon one of its cars. The defendant called "a physician, as a witness, who was at the scene of the "accident, when an ambulance arrived, and who ren- "dered 'first aid' to the plaintiff. The witness was, "also, an attending physician at the hospital to which "the plaintiff was assisted by him in the ambulance; "but he rendered no further services to him while in "the hospital. The witness was asked to relate a con- "versation, which he had with the plaintiff in the hos- "pital, subsequently; but the court sustained an object- "ion to its admissibility under section 834 of the Code "and the witness was not allowed to testify to what was "said by plaintiff with reference to his sufferings, or to "the accident. When the case reached this court, it "was held that the exclusion of the physician's evi- "dence was an error for which the judgment should be "reversed and a new trial had. The decision by this "court rested upon the ground that the burden upon "the plaintiff of showing that the evidence was within "the statutory prohibition had not been met, and that "the facts did not warrant the presumption that the re- "lation of physician and patient existed. The opinion, "quite fully reviewed the cases illustrating the appli- "cation of the statutory provision in question, and that "the rule was distinctly adhered to that, to warrant the "application, it must appear that the relation of phy- "sician and patient, at the time existed, and that the in- "formation sought to be excluded was necessary to "enable the physician to act as such. Previous to the "Griffiths case that rule had been expressed in *People* "vs. *Koerner* (154 N. Y., 355).

"Can we say that the rule applies to such a situation, "as that disclosed in this case, any more than it did in "the Griffiths case? I think not. *It seems to me to be* "*difficult to assert, with any gravity of countenance, at* "*least, with Meyer rejecting the witness' presence and*

"services, and cursing against his interference, and with "the witness' determined efforts to prevent Meyer from "dying in the hotel, whose servants had summoned him, "that the relation of physician and patient arose, and "that the confidential relation existed, which the statute "has in view, and which, with a tender solicitude for a "patient's interest, it is designed to safeguard."

(The italics are ours).

POINT FOUR.

The opinion of the New York Court of Appeals.

The Court of Appeals erred in two essential points. They are:

(*a.*) That the contract in question is not an Illinois contract, but a New York contract, made in contemplation of and subject to the statute whose validity is here attacked when it is sought to stretch its obligation impairing qualities over the foreign contract, and

(*b.*) That the relationship of physician and patient ever arose between Druso and Emanuel Meyer.

(*a.*) The essential vice of the contention that this is a New York contract arises from a departure from those strict rules of definition which have always been deemed necessary by thinking men to be applied to those sciences which rest upon logic and reasoning.

Nothing can be clearer than that the application in this record is an offer to enter into a contract of insurance made by Emanuel Meyer to the plaintiff in error.

Nothing can be clearer than that the acceptance of that offer is evidenced by the execution of the benefit certificate, the sole evidence in this record of the acceptance of his application.

Nothing can be clearer than [nor is there any higher order of evidence known to the common law than the production in court of the original specialty] that the offer was accepted as recited in the specialty on the 20th day of September, 1894, at Chicago, Illinois.

And nothing can be clearer than that, in that moment *and at that place*, the contract sued upon arose, and that the colition of the minds of the parties *there* had breathed into that contract the legal breath of life.

Its birthday was September 20, 1894, *and its birthplace* CHICAGO, ILLINOIS.

Nothing then remained to be done, the conditions were fixed, neither party could alter the contract without the consent of the other.

In order to hold otherwise, it is necessary to decide that had Emanuel Meyer died the next day and before delivery of the certificate to him, then no obligation to pay the secured sum to his beneficiary would have existed. But this is not the law.

Fidelity Mutual Life Ass'n vs. *Ficklin*, 74 Md., 172.

Welsh vs. *Continental Ins. Co.*, 47 Hun., 598.

Clark vs. *Union Fire Ins. Co.*, 6 Ont. Rep., 223.

May on Insurance (4th Ed.), Sec. 54c.

It is also necessary to decide that the elementary rule that the contract arises upon the acceptance of the offer is not the law of this land. The desire to reach particular results must never lead courts to abandon that strict adherence to logic, which alone rescues the law from the domain of chance and elevates it to the pedestal of an exact science; which alone enables the law to hold its proper and legitimate place as a great instrument of human civilization, of human enlightenment and of human happiness.

The foundation of our common law is the doctrine of *stare decisis*, and once we let down the bars to loose reasoning, throwing over the pillars of elementary definition and crushing the arches of rigid syllogism, the whole beautiful superstructure of our jurisprudence totters and falls of its own weight, burying in ruins all that our ancesters have so hardly earned, a government of law and not of men.

Mrs. Meyer may be a widow deserving of charity, or she may not. That question is irrelevant and immaterial to this discussion.

Where did the contract in suit arise? Surely contracts arise where and when they first become binding upon the obligors. Is there any possibility of controverting this?

The fact that the then named beneficiary resided in New York when the application was signed, has no more to do with the question than has the capture of Port Arthur, for

(a.) no one could say she would be living there when her rights became vested by Meyer's death. She might well have been living in Muckden, Paris or Constantinople.

Shall we then say that the Chinese, or perchance Russian or Japanese law governed this contract because that had become the place of performance, or the French or Turkish law?

And

(b.) for a more serious reason, that it was always in the power of the member to change his beneficiary without her consent.

> " * * * Any person who became an appointee "in such a certificate took the position subject to the "absolute right of the member to substitute a new one "at any moment. The rights acquired by the member "by virtue of this relation did not amount to a chose in

"action. He had no interest in the society that was "assignable or transferable until some right of action "had accrued. The appointee had no vested interest "in the sum which might in a contingency become "payable on death of the member. (*Hellenberg* vs. "*Dist. No. 1, supra; Sanger* vs. *Rothschild, supra;* "*Brown* vs. *Catholic Mutual Benefit Assn.*, 33 Hun., "263; *Boasberg* vs. *Cronan*, 30 N. Y. S. R., 483.)"

Sabin vs. *Phinney*, 134 N. Y., 422 at 428.

So Meyer, at any time during the life of the certificate, could have changed the beneficiary to a sister in Chile, a brother in Bangkok, his mother in Austria or his father in Costa Rica.

If that be the test, what *is* the law of the contract?

Is it not beyond question, cavil or doubt that the place whose law is to be read into this contract is the law of the place where the *offer* to be insured was changed by the acceptance of that offer by the offeree into *a contract of* insurance?

Can it be seriously contended in this case that any one spot on this great earth other than Chicago, Illinois, complies with this definition?

The court of Appeals of New York says at record folio 106:

"By the terms of the certificate, the agreement of "the defendant was subject, not only to the conditions "subscribed to by the member in his application, but "'to the further conditions and agreements hereinafter "named,' and the clause containing his acceptance, "above quoted, was one of those 'further agreements.' "From these terms of the agreements of the parties "the only natural conclusion is that the place of the "contract was where it was intended, and understood, "to be consummated. Its completion depended upon

"the execution by the member of the further agree-
"ment endorsed upon the certificate, namely to accept
"it 'subject to all the conditions therein contained.'

"The contract was not completed, in the sense that
"it was binding upon either party to it, until it was de-
"livered in New York after the execution by the mem-
"ber of the further agreement expressing the unqual-
"ified acceptance of its conditions."

Are not the agreements set forth *quoad "agreements"* in the certificate? Are they not called *"agreements"* in the certificate?

If this acceptance were one of "the further agreements" would it not be so called? Would the clause not have read:

"*It is further agreed* by the undersigned that he hereby accepts the certificate of the membership subject to all the conditions therein contained."

Why is the word THEREIN used in the acceptance, if it is part of the instrument? The acceptance should be "of all the conditions HEREIN contained."

HEREIN, not THEREIN.

This part of the opinion of the learned justice (Mr. Justice Gray), although concurred in by the whole court, must be deemed a piece of reasoning in which the later schoolmen might have taken delight, but which blackens and curls up in the fierce light of reason and before the attack of rigid logic and exact definition.

(b.) To show that the relationship of physician and patient did *not* arise between Dr. Bruso and Meyer, we ask no better advocate than Mr. Justice Gray. We can advance no stronger argument, no more cogent reasoning, no more pitiless logic, than is contained in that branch of his great dissenting opinion which deals with this question.

Laying at his feet the tribute of our admiration for his magnificent discussion of this question, we respectfully quote his opinion on the subject of the relationship between Bruso and Meyer, hereby adopting it as our own (*supra*).

POINT FIVE.

The importance of the question.

That this question is of more than ordinary importance to the population of this whole country, for which this court announces the law, it becomes our duty at this time to point out the importance of the questions here involved in the jurisprudence of America.

We feel justified in calling attention, in a general way, to the radical differences between the contracts of life insurance companies and fraternal benefit societies.

It is true that both systems have medical examinations of applicants, tables for fixing the contributions of members, may have reserve or surplus funds, and both provide for the payment of sums at the death of the insured. All of these features are essential to both systems, because the death element is common to them. There is no similarity in the objects, organizations, plans of operation, contractual relations with members or rights of the beneficiaries.

The life companies are financial enterprises, organized and conducted for the purpose of profit. Their premium tables contain three elements: Expense, reserve and mortuary, and are so constructed as to yield an excess over the demands upon each. The plan upon which they are organized does not contain any provision for meeting a deficit, because none is contemplated.

Their business is selling insurance, at a fixed price for limited terms, or for life. The corporation is the con-

tractor who sells, and the insured is the customer who buys. Their interests and relations are always opposite.

The policy of insurance issued by these companies is an unyielding contract, fixing all the relations and rights of the parties, without future modifications.

The insured has no more interest in the corporation than has a depositor in the bank with which he does business; and the profits arising from the surplus or excess collected from him or the accumulations of interest, are generally no more his property than are the earnings of the banks from loans of deposits the property of customers. As soon as the policy is written, the beneficiary, who need not be a relative, has a property interest; and that interest can not be changed to another by the corporation, the insured, or both, without the consent of the person thus designated.

These companies have a fixed premium, and a fixed liability to the beneficiary named in the policy.

There is no reservation of power by the insured; he has no voice in the business policy of the corporation, and has no other interest in its future than that it shall survive him, and be able to carry out its contract.

What is said here is equally true of all regular life companies, whether they be ordinary stock, mutual or assessment companies.

Fraternal societies are purely mutual, being fraternal, and the outgrowth of a practical plan of charity. Their plan is such that the members are both insurers and insured. The old members solicit new ones and contribute to the common funds of the society; they unitedly enact new laws or modify existing ones, thereby changing their contracts with each other at pleasure. These contracts consist of the charter, application, by-laws and benefit certificate.

The members are not only the insurers and insured, but are legislators, managers and joint shares in all the benefits and relationships incident to equality of burdens and benefits. The fraternal corporation is merely a piece of machinery through which, as a medium, the members contract with each other. The fraternal societies were not generally incorporated until recently; and their incorporation is solely for convenience. The officers and managers of such societies are selected for short terms, are constantly changing, and are generally men of little or no experience in the business of life insurance.

There is no division of profits or excess over current demands, for there are no profits earned. Their tables of rates are based upon a minimum expectancy of requirements and any deficiency is provided for by special assessments.

The beneficiary has *no vested interest*, but may be changed at will by the member, within the relations of kinship and dependency. The tables of assessment may be changed, and the promised benefits may be enlarged at the will of the governing body, which is composed of representatives chosen by and from the membership. The whole scheme is controlled by the voice and action of the insured. The most humble member holding the smallest benefit certificate issued has equal voice in the society with the most exalted. The fraternal insurance plan is the product of the times, and was designed and is conducted for the purpose of filling the place in the economy of civilization heretofore occupied by organizations of practical charity.

Formerly, when a member of a secret fraternal society died the members passed the contribution list to pay off the mortgage left hanging over the home of the widow and orphan. As an outgrowth of that inadequate plan of relief

and charity, and with the same spirit of brotherhood, the fraternal insurance plan was inaugurated.

In life insurance companies, the element of profit production is the inducing factor for incorporation and development. In fraternal societies, in addition to the social benefits extended, the desire is to obtain mutual protection at a minimum cost to each member. In one, the attraction is profit, in the other it is saving. In one, the insured pays a large sum to the others to solicit new business and manage the enterprise; in the other, the member shares with his fellows the labors of soliciting accessions and the administration of the joint business, in order that he may secure he benefits at a saving sometimes of an amount equal to two-thirds the financial cost of the life company plan.

It will be seen from the foregoing that the two systems differ in cost, plan, management, interest and responsibilities. The object to be attained is entirely different in these systems, and the method of accomplishment is equally divergent from any point of view that may be selected.

Some idea of the interests involved may be obtained from the following fact: The societies of the class represented by the plaintiff in error have an aggregate membership in America of over four million members.

During the year 1902, fraternal societies in the United States paid to members' beneficiaries more than $56,000,000 in cash benefits, and at the end of the year 1902 these societies had 4,332,973 beneficial members (social members not counted) in good standing upon their books, who were carrying protection in such societies amounting to $6,374,471,930, nearly $7,000,000,000.

New York Insurance Report, 1903, pp. VI & VII, of parts III & IV.

Every such contract affects not only the member, but at least one beneficiary, and the average number of beneficiaries is probably at least equal to double that. Moreover, where the father and head of the household makes the mother, his wife, the beneficiary, the proceeds are as much used for the benefit of the children in the great majority of cases as for the actually named beneficiary.

It is largely true that the class of people who use this form of life insurance can not afford the Old Line Insurance, and that their estates usually contain but little outside of the proceeds of these benefit certificates. It will, therefore, be readily apparent that about one person in five in these United States is adversely affected by any decision which tends to weaken these benefit certificates or to enhance the cost of this form of insurance.

It needs not be argued here that if risks of the class here sought to be enforced by the defendant in error are to be deemed within the provisions of the certificate, that the cost of meeting those risks must fall upon those who can but ill afford the expense.

It can not be asserted too often or too strongly that these organizations are not organized for profit, but for saving. The act of the congress incorporating the plaintiff in error provides that the society is not organized for profits, its purposes being purely benevolent. That such societies endeavor to give the poor man the same assurance as the great financial institutions that his loved ones will be safe from the pangs of hunger after his death, and that no profit is sought, no dividends have to be paid upon stock held by investors, that but little has to be earned to pay the moderate salaries of the officers thereof.

But it must be asserted just as strongly and just as often that these organizations must not and can not sell insurance

below cost; that every increase in the cost, increases the burden upon the member; that every risk the organization is compelled to assume increases the cost to the member, and that when risks have been excluded for reasons which are good in morals, courts should be slow to saddle honest members with the payment of certificates to which moral obloquy is attached. It is peculiarly true of a fraternal society that a court should not be astute to emblazen across the face of its benefit certificates the cynical maxim of the dissolute Roman Emperor, "*Pecunia non olet.*"

The fact can not be denied that Meyer suicided, and that his death was accomplished by a conscious and deliberate act committed with the criminal purpose accomplished. Except for the liberal and highly equitable rule of the society to voluntarily agree to pay a part of the certificate, nothing would be due the beneficiary. This Honorable court has long ago announced the public policy of this country to be against the enforcement of contracts of insurance in cases where the insured suicided. Even if the risk under the contract expressly covered death by suicide the contract could not be enforced because such a provision would contravene public policy.

Ritter vs. *Mutual Life Ins. Co.*, 169 U. S., 139.

19 Am. & Eng. Encyp., p. 74.

POINT SIX.

The Holden case, supra, is inapplicable to the case at bar.

The testimony of the physicians in the case at bar ought to be admitted on grounds of fair dealing and equitable conduct towards Meyer's fellow-members.

This Honorable court will take judicial notice of the universally known fact that the contributions of the members to the insurance fund of mutual benificiary societies, like the plaintiff in error, are based, as to frequency and amount, upon tables of mortality experience, and that by the exception of certain causes of death from the covered risk, Meyer was enabled to secure a very considerable reduction in the cost of that assurance.

These exceptions are set forth in his application (Rec., fol. 160). A glance of them will show that these exceptions are of such causes as involve active moral turpitude, are the results of his own wickedness or folly, and are not, any of them, the results of unmerited misfortune, or unavoidable by the man of common decency and honor. They are:

1. Suicide.
2. Intemperance.
3. Drug habits.
4. Duelling.
5. Death at the hands of justice for the committing of crime.
6. Death occasioned by or during violation of the criminal law.

This by-law has been held valid in the home of the corporation.

Supreme Lodge, Knights of Pythias vs. *Clarke*, 88 Ill., App., 600.

Seitzinger vs. *Modern Woodmen of America*, 204 Ill., 58.

The former case was an action brought upon a contract in all respects like the one at bar. Clarke committed suicide by the taking of morphine, and the defendant tendered the amount due under the suicide by-law, as in the case at bar. The jury having found a verdict for the plaintiff for the full amount, and the defendant having appealed, Mr. Justice BIGELOW, in writing the opinion upon which that judgment was reversed, after discussing the evidence which showed that Clarke had committed suicide, had this to say:

"The Supreme Court of the United States in *Bigelow* vs. *Berkshire Life Ins. Co.*, 93 U.S., 284, after stating that insurance companies could, by stipulation, avoid various classes of risks, said:

"'*Surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they can not limit their liability, if the assured is, in proper language, told of the extent of the limitation, and it is not against public policy.*'

"*It is admitted that the assured was told in his certificate and the by-law adopted by appellant, which, taken together, formed the contract between the parties, that if his death should 'result from suicide, either voluntary or involuntary, whether * * * sane or insane at the time,' the amount to be paid to the beneficiary would be the value of the certificate at his death, to be computed in the manner set forth in the stipulation.*

"*By this agreement the amount to be paid was conditioned on the manner of death of the assured.*

"If he should meet death in due course of nature, one sum was to be paid to the beneficiary, but if he should take his own life, another and a less sum was to be paid. In no event was there to be a forfeiture of the so-called policy, but the plain agreement was, that the beneficiary was not to profit by an act of the assured in taking his own life, and the order of which he was a member was not to be wronged because of the act. *It seems to us that such a contract should be regarded with favor by courts, as it is not easy to conceive of one more just and equitable to all parties concerned.*

"But if the contract is to be regarded the same as a policy of a life insurance company, containing a clause providing that if the assured should commit suicide, whether sane or insane at the time, the policy should become void; and if it is held that the words 'sane or insane' do not embrace all species of insanity, as is contended in the instruction given by the court, there still remain the words 'voluntary or involuntary.' applied to the word 'suicide.'

"It must be conceded that the adjective 'voluntary' in nowise dequalifies the noun 'suicide,' when the latter is used in its strictly legal sense, since in that sense all suicide is voluntary, and in such a sense there can be no involuntary suicide. But the word 'involuntary' was used in its popular sense, and it should be so construed as to give it the meaning intended by the parties using it, and when so construed it means self-destruction without volition, and embraces, as we think, every act of self-destruction not voluntary or intentional.

"*No authority has been cited and we are unable to find any holding an agreement against public policy which provided that if death resulted from suicide, whether sane or insane, the policy should become void, and we can not so hold.*"

In the very late case of *Seitzinger* vs. *Modern Woodmen of America*, 204 Ill. (*supra*), decided on October 26, 1903, the Supreme Court of Illinois held in construing a by-law, in terms almost the same as the one at bar.

> "A clause in a life policy providing against liability "if the insured 'shall die by his own hand, whether "sane or insane,' is a complete exemption from liability "in the case of suicide by the insured, notwithstanding "he was wholly insane and totally incapable of under- "standing the physical nature and effect of his act."

An illustration will make clear what we have said, that it would be inequitable, unfair and unjust to compel Meyer's fellow-members to cover a risk specifically excepted by the contract, where that risk involved active moral turpitude. A man is assured by the membership of the plaintiff in error upon liberal terms made possible by the belief that he will not run the risk of cutting short his life and his contribution to the general fund, by engaging in the commission of crime. With the assurance that his contract will be made a dead letter by the State of New York, through its exclusion of evidence, valid and admissible under the contract, he engages in the robbery of a bank, is attacked and mortally wounded—callously tells of his crime to the physician first on the scene, and dies. Will the courts of the State of New York aid his heirs to extort the face liability of the certificate from the law-abiding membership of the plaintiff in error, and thus present the curious picture of the courts of justice aiding the fraudulent to amerce the innocent?

But what else is the result in the Meyer case—or are the facts in the given illustration, *mutatis mutandis*, too strongly stated? What Meyer did, put into his own words (Rec., fol. 75), was to boast of his crime against himself, his family,

his State and his God, and in the shadow of approaching death, summoned by his own act, to blaspheme the name of his Maker, and to curse the helping hand which was stretched out in an unaccepted offer to assist him. Language which paints him, out of his own mouth, a hardened moral nature, the essential and fundamental criminal engaged in perpetrating his last fraud, which in its extent was to affect (with the countenance and aid of our courts of justice, if the error committed by the New York courts is not corrected), every man to whom he had sworn brotherhood and to rob the innocent, law-abiding and decent, by resting upon a construction of a praiseworthy statute, which would twist it into an instrument of deliberate robbery.

It needs but to be pointed out to show the monstrous injustice of applying the decision in the Holden *supra* case to the case at bar. This has been made clearer by the discussion of the essential and underlying fundamental difference of the contract in question from the ordinary contract of life insurance (sometimes called old line insurance).

See Point Three, *supra*.

POINT SEVEN.

The Holden case is anomalous in the law.

When the application was offered and received in evidence on the trial of this action at that moment the stipulation waiving the physicians' privilege became part of the record and the waiver was, therefore, made upon the trial of the action.

Foley vs. *The Royal Arcanum*, 78 Hun., 222.

Dougherty vs. *The Met. Life Ins. Co.*, 87 Hun., 15.

Holden vs. *The Met. Life Ins. Co.*, 11 App. Div., 426.

The defendant in error relies upon the opinion of the Court of Appeals of the state of New York in the Holden case, 165 N. Y., 13, but the plaintiff in error contends:

(*a.*) That that case has no application to the case at bar, and

(*b.*) That section 836 of the Code of Civil Procedure when applied to a case like the one at bar, impairs the obligations of the contract and is not merely a rule of evidence.

(*c.*) The Metropolitan Life Insurance Company is a so-called "old line" company which in making up its table of insurance rates takes into consideration the suicide statistics, whereas with the plaintiff in error at bar it is a far different case.

No provision is made by the plaintiff in error to cover premature claims arising out of suicide and it only calls its assessments after the death of the member has actually taken place.

This is a beneficial association, and in many respects the courts have drawn sharp distinctions between this class of insurance and that conducted on the so-called Old Line plan, which is other than mutual and looks to profit.

The only instance in the law of the state of New York holding that the waiver in question does not take the case out of the statute is the Court of Appeals decision in the Holden case, *supra*. Recognizing the distinction between the two classes of insurance the appellant respectfully urges that this Honorable court should seek to limit that decision rather than to extend it. In the first place the construction there given to the statute opens wide the door to fraud against the helpless society and should therefore be confined strictly to the facts as they appeared in the Holden case. This contention is the more strongly urged because

every decision in the state of New York upon the subject was exactly to the contrary up to the time the Holden case was decided by the Court of Appeals.

Hewitt vs. *Prime*, 21 Wend., 79.
Foley vs. *Royal Arcanum*, *supra.*
Dougherty vs. *The Met. Life Ins. Co.*, *supra.*
Holden vs. *The Met. Life Ins. Co.*, *supra.*
Edington vs. *M. L. Ins. Co.*, 67 N. Y., 185.
Pierson vs. *People*, 79 N. Y., 424.

See also:

G. R. R. R. Co. vs. *Martin*, 41 Mich., 671.
Hunt vs. *Blackburn*, 128 U. S., 470.
Blt. & S. D. Co. vs. *L. Ins. Co.*, 34 Fed. Rep., 870.
Sentenis vs. *Ladew*, 140 N. Y., 463.
Mayor etc., vs. *M. R. Co.*, 143 N. Y., 1.
Greve vs. *A. E. L. S. Ins. Co.*, 81 Hun. 28.
Rosseau vs. *Bleau, et al.*, 131 N. Y., 177.
Ins. Co. vs. *Martin*, 3 N. W., 173.
Fuller vs. *Knights of Pythias*, 40 S. E., 65.
Woodmen of the World vs. *Loeher*, 68 Pac., 136.
Woodmen of the World v. *Grandon*, 69 N. W., 448.

The Court of Appeals itself, in affirming the case of *Foley* vs. *Royal Arcanum*, 151 N. Y., 196 (reported below in 78 Hun., 222), which was decided but a few years before the Holden case, uses the following language:

> "A more serious question is presented with reference to the waiver. It is contended that a waiver before the trial is against public policy, and that the law at the time of the trial did not permit it. The law, as it stood at the time the contract was made, provided that 'a person duly authorized to practice physic or surgery, shall not be allowed to disclose any informa-

tion which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.' Section 836 provided that 'the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client.' At the time of the trial, the last section had been amended so as to require the waiver to be made upon the trial. It will thus be seen that the right to waive is given by the express provisions of the Code. The right of the legislature to establish rules of evidence and to make them applicable to all trials thereafter had is unquestioned, but it can not pass an act impairing the obligations of a contract. The waiver, as we have seen, was a part of the contract. It was made to induce it. It was authorized by the Code, and is binding upon the parties unless the making of it at that time was against public policy."

Applying the decision in this case to the case at bar, we find them to be upon all fours.

The Foley Case.	The Meyer Case.
"It will thus be seen that the right to waive is given by the express provisions of the Code."	The right to waive, as has been shown, existed under the law of the place where the contract was made, *i. e.*, the State of Illinois.
"The right of the legislature to establish rules of evidence and to make them applicable to all trials thereafter had, is unquestioned,	The right of the legislature to establish rules of evidence and to make them applicable to all trials thereafter had, arising out of con-

but it can not pass an act impairing the obligations of a contract."

tracts with which the legislature of the State of New York has power to deal (*i. e.*, New York contracts) is unquestioned, but it can not pass an act impairing the obligations of a contract.

"The waiver, as we have seen, was a part of the contract."

The waiver, as we have shown, was a part of the contract.

"It was made to induce it."

It was made to induce it.

"It was authorized by the Code," the *lex loci celebrationis.*

It was authorized by the laws of Illinois, the *lex loci celebrationis.*

"And is binding upon the parties unless the making of it at that time was against public policy" [as public policy is declared by the courts of the State of New York, which is the jurisdiction within which originated this contract].

And is binding upon the parties unless the making of it at that time was against public policy as described by the courts of the State of Illinois, the place where the contract was made, as we have shown.

In this case this court held the waiver not to be against public policy.

No decision of the courts of the State of Illinois has ever been made holding such a waiver to be against public policy.

It is, therefore, a conclusion which can not be resisted that the waiver in the case at bar was, under the decisions,

effective and binding, and the judgment should, therefore, be reversed for the error of the learned trial justice in disregarding the same.

In the matter of N. Y., L. E. & W. R. Co., 98 N. Y., 447, the Court of Appeals, speaking through EARL, J., say at page 453:

> "Parties, by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been, and will be enforced; and, generally, all stipulations made by the parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts."

In the matter of Colem , 111 N. Y., 220, an attorney of the testator was requested to sign the attestation clause of the will as a witness. It was held that this was an express waiver within the meaning of section 836 of the Code. In this case it will be seen that the waiver was before the death, and intended to take effect after death upon the probate of the will. RUGER, Ch. J., in delivering the opinion of the court, says with reference thereto:

> "It can not be doubted that, if a client in his lifetime should call his attorney, as a witness in a legal proceeding, to testify to transactions taking place between

himself and his attorney while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts learned through their professional relations upon a judicial proceeding to take place after his death? We think not. The act of the testator, in requesting his attorneys to become witnesses to his will, leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove."

In *Adreveno* vs. *M. R. F. Life A.* (34 Fed. Rep., 870), the action was upon a certificate of insurance which contained a clause of waiver similar to the one we have under consideration. The statute of Missouri provided that "the "following persons shall be incompetent to testify: A phy-"sician or surgeon, concerning any information which he "may have acquired from any patient while attending him "in a professional character, which information was neces-"sary to enable him to prescribe for such patient as a physi-"cian, or to do any act for him as a surgeon." THAYER, J., said:

"The statute is construed in this state as conferring a privilege merely that may be waived; it is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect the courts of this state follow the rulings in New York and Michigan under a similar statute, as appears by the cases of *Cahen* vs. *C. L. Ins. Co.* (41 N. Y.

Super. Ct., 296); *R. R. Co.* vs. *Martin*, 41 Mich., 667. As the patient is at liberty to waive the privilege which the law affords him, at appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit was brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on any one who claims under the contract, whether it be the patient himself or his representative."

To the same effect is

Thompson vs. *Ish*, 99 Mo., 160.

In *Hewitt* vs. *Prime* (*supra*), it was held by the court, NELSON, C. J., writing the opinion, "that the physician who had been consulted by the defendant, was not privileged."

"It is very doubtful whether the communication made to him by the defendant can be considered as consulting him professionally, within the meaning of the statute and it is certain that the information given was not essential to enable him to prescribe for the patient."

2 R. S., 406, Sec. 73 (the origin of C. C. P., Sec. 834, N. Y.).

This was an action for seduction of plaintiff's daughter and defendant had told physician of her pregnancy, and asked for means to procure an abortion.

Meyer had expressly agreed to the waiver in question. He waived at best a statutory provision for his benefit, existing in some jurisdictions and not in others; broad in certain states, narrower elsewhere. He received a liberal *quid pro quo* in the cheaper insurance of the contract based upon the exception from the risk of cases where a member's own immoral acts would make that risk the greater, and

the ability of the defendant, under the contract to prove the fact of such immoral acts. And now comes the defendant in error asking the court to say that Meyer's solemn contract is void in that regard, and to lend its aid to the preparation of this great wrong.

But let us see to what extent the courts of New York state have gone in enforcing a waiver once made. An instructive case is that of *Pierson* vs. *The People, supra.* This was an appeal from a judgment of death pronounced upon the rendition of a verdict of guilty, upon the trial of an indictment for murder.

EARL, J., speaking for the court, says, at page 429:

> "One may waive constitutional provisions made for his benefit."
>
> *Lee* vs. *Tillottson*, 24 Wend, 337.
> *Van Hook* vs. *Whitlock*, 26 Wend, 43.
> *The People* vs. *Murray*, 5 Hill, 468.
> *Baker* vs. *Braman*, 6 Hill, 47.
> *Embury* vs. *Conner*, 3 N. Y., 511.

He says:

> "A prisoner may waive a trial by jury and plead guilty; he may waive a plea of *autrefois acquit* by not interposing it or withdrawing it; he may waive or withdraw a challenge to a juror; he could waive his right to have a challenge of a juror for favor tried by triers and consent that it be tried by the court; he may waive objections to improper or incompetent evidence; in a court of special sessions he may waive a trial by jury and be tried by the court; he may waive a challenge to the array of jurors by a challenge to the polls; he could consent to the separation of the jury during the trial, when such separation without such consent would be ground of error. A man can not be legally indicted and tried as accessory to a felon until the

principal be convicted; and yet, if he go to trial without insisting on the objection, he is held to have waived it."

People vs. *M'Kay*, 18 J. R., 212.
People vs. *Mather*, 4 Wend., 229.
People vs. *Rathbun*, 21 Wend., 509, 542.
Stephens vs. *People*, 19 N. Y., 549, 563.
Gardiner vs. *People*, 6 Parker Cr. R., 155.

And in the leading case of *Cancemi* vs. *The People*, 18 N. Y., 128, the Court stated the test of what could not be waived to be twofold:

(*a*) That the state has an interest in the preservation of the lives of its citizens, and will not see them give those lives away, and

(*b*) one can not waive the substantial constitution of the court, nor change its fundamental mode of procedure.

Neither of these exceptions are embraced in the waiver now under consideration, but flatly and clearly, the Honorable Court of Appeals of New York has said that just such a waiver is one, that having been made, must be enforced.

"He may waive objections to improper or incompetent evidence" (*supra*). He may do it when on trial for his life, but, if respondent be correct, not in a contract of insurance, made for his benefit, paid for in cheaper rates and furnishing an incentive not to commit an awful sin and a cowardly crime. Will this stand the test of reason?

Is it not the better described by the court in the Pierson case, *supra*, at page 432, that this waiver "affects no public "interest, trenching upon no public policy, and to hold that "it could not be waived would be without precedent and "against reason?"

If it be said that a method of waiver is provided by the statute, this is not so. It is the contention of the plaintiff

in error that the defendant in error could *not* waive the objection to the physician's testimony, had Meyer not done it for her.

N. Y. C. C. P., Sec. 836.

Meyer is the patient, not the beneficiary. He is not present at the trial. He is dead, and, judicially speaking, lives only in his acts. He has given her no power of attorney to waive for him, and the statute expressly excepts from the power of the legal representative to waive the provisions of Sec. 834, "such facts as would tend to disgrace "the memory of the patient."

The fact sought to be proved is that Meyer wickedly and deliberately committed suicide. Mrs. Henrietta Meyer can not waive Sec. 834 in *that* regard. It can not be contended that it was the purpose of the legislature to prevent any of that fact becoming known, if in the hands of physicians only. Such a fact can only be told by permission of the *patient* himself, *and that permission was produced, offered and without objection accepted at the trial and is part of the evidence upon this record* (fols. 158-159).

"*Cessat ratione, cessat lex.*"

We could not subpœna Emanuel Meyer, who, having succeeded in his nefarious purpose, passed beyond the jurisdiction of the trial court. We did bring there his solemn act and deed, the best that could be done.

> "Into his hand the legislature, having locked the secret, had put the key. He can forego the privilege and unlock the doctor's mouth."
>
> *Dougherty* vs. *Met. Life Ins. Co.*, 87 Hun., 15.

Will this Honorable Court place an impossible burden upon the defendant?

The fact sought to be proved is the suicide of Emanuel Meyer. This, if true, is a fact which disgraces his memory. The proof offered tends to fasten this disgrace upon him. No one but he can waive the objection to the proof. The disgrace is in the success, and that success takes it out of plaintiff in error's power to procure his audible assent to the waiver at the (time and place of) trial. Plaintiff in error offers this pact made with this very thing in view. Is it not sufficient?

And herein is the distinction between the Holden case and the case at bar. In that case the question was a breach of warranty, and whether insured had bronchitis or not, he may have been a decent citizen and a God-fearing man. There was present at the trial one who could waive the prohibition and the defendant was unfortunate in not being able to secure it. This is as though a witness testified in a manner different from the expectations of counsel, and thus he loses his case. But here is the only instance where the one person who can waive the privilege of the witness makes the testimony necessary by his own crime, and the same crime makes impossible the consent for which the statute provides, if defendant in error is correct.

Thus would the law in that regard be a dead letter from its inception, and the legislature, in passing it, stultifies itself.

To sum up: Emanuel Meyer, and he alone, can waive the prohibition of the statute against the testimony of the men to whom he chose to boast of his deed of ill-fame.

Emanuel Meyer has done so, and departed hence. The evidence is, therefore, admissible, and for the error of excluding it this judgment must be reversed, that justice be done, and the plaintiff in error restored to all and singular what it has lost in the premises by the errors aforesaid.

POINT EIGHT.

The evidence was admissible to prove the contract.

The contract provided for the payment of a fixed and definite sum ($2,000), if matured in the course of nature, and a different, but fully as fixed and definite a sum if matured by the act of the member. This is evident from the clause of the application (*supra*).

S. L. K. P. vs. *Clarke*, 88 Ill. App., 600 (*supra*).

Bigelow vs. *Berkshire Life Ins. Co.*, 93 U. S., 284 (*supra*).

Linz vs. *Mass. Mut. Life Ins. Co.*, 8 Mo. App., 363.

By the by-laws of the plaintiff in error (Rec., fols. 41-42), an inflexible, certain and mathematical rule was established by the contract fixing with accuracy and arithmatical exactness the amount of money covenanted to be paid, if the condition subsequent of suicide should mature the contract. The member's expectancy, at entrance into the contract, is known and fixed by his age at such entrance, and thus becomes one of the unchangeable factors in the covenanted liability, depending as it does upon the well known American experience table of mortality then in force. The time elapsed before he matured the contract (in the case of a suicide) lay absolutely in his own hand, and he alone could fix the value of that factor, and the third factor (the face of the certificate in case the contract naturally matured) is also known. To find, therefore, the covenanted liability, and for that purpose to prove the contract, it is necessary to show whether or not it falls within the class of naturally maturing or artificially and immorally maturing contracts.

The evidence of suicide ought, therefore, in any event, to be admissible to prove the contract and show that it was of the "suicide-maturing" and not of the "course of nature maturing" class of contracts, and thus show what *was* the measure of the obligation covenanted and that element of the contract.

POINT NINE.

The trial court erred in excluding the testimony of the witness Bruso.

Griffiths vs. *Met. St. Ry. Co.*, 171 N. Y., 106.
People vs. *Koerner*, 154 N. Y., 355.
Fisher vs. *Fisher*, 129 N. Y., 654.
People vs. *Schuyler*, 106 N. Y., 298.

It is well settled that in order to shut out the testimony of a witness on the ground that it is privileged, the burden is upon the party seeking the exclusion to show that it comes within the prohibition of the statute.

In the Griffiths case, *supra*, Judge WERNER, writing the opinion, says, p. 111:

> "To bring the evidence of a physician within the prohibition of the code section above quoted, three elements must coincide:
>
> "1. The relation of physician and patient must exist.
>
> "2. The information must be acquired while attending the patient.
>
> "3. The information must be necessary to enable the physician to act in that capacity. * * *
>
> "It is the well settled rule that the burden of showing that evidence sought to be excluded under this section is within the prohibition of the statute, rests upon the party seeking to exclude it."

In *People* vs. *Koerner*, *supra*, Judge MARTIN lays down the following rule:

> "Where the testimony of the physician is sought to be excluded under the provisions of that section (834) of the code, the burden is upon the party seeking to exclude it to bring the case within the provisions. He must make it appear not only that the information which he seeks to exclude was acquired by the witness while attending the patient in a professional capacity, *but also that it was necessary to enable him to perform some professional act.*"

In the case at bar the plaintiff below did not even attempt to show that the relation of physician and patient existed between Emanuel Meyer and the witness Bruso. Indeed, it is quite doubtful whether such relationship can arise despite the patient's protest and against his express refusal to be treated. A reading of Dr. Bruso's testimony (which the learned trial court excluded), will show that Emanuel Meyer vehmently and in strong language refused to be treated and thus enter into the relationship. Can it be said that under such circumstances the law will seal the mouth of the physician? Must not the relationship, like that of attorney and client, arise voluntarily; that is, by the consent of the parties? Assuming for the sake of argument that the relation does arise under these circumstances, will it be contended that it is such a case as that contemplated by the statute? At all events, could it arise *against* the *expressed will* of the patient?

It is to be remembered that at common law the physician's testimony was not privileged. The privilege is merely the creation of the statute, and we respectfully contend that that act contemplates a case where the relationship is freely and voluntarily entered into and is designed to pro-

tect those who seek the aid of the physician, *and not where treatment is declined.* If under these circumstances a statement is made, it is respectfully contended that it is admissible in evidence, if otherwise material and relevant.

POINT TEN.

The refusal of the learned trial court to consider the physician's proof of death in evidence constituted reversible error.

It was a condition precedent to any liability on the part of the plaintiff in error that proper proofs of death should be made. As has been shown before (point 1, *supra*), the by-laws in force at the time the contract was entered into are an essential part of the contract between the late Emanuel Meyer and the plaintiff in error by which the defendant in error is bound (see authorities cited under point 1).

Among the by-laws of the society in force at the time of the admission of Emanuel Meyer to membership in its Endowment Rank were the following (fols. 190-192):

"ARTICLE XII.

Proof of Death.

"Section 1. The proof of death shall in all cases be furnished by the beneficiary or beneficiaries on blank forms to be obtained of the Board of Control, and shall contain affidavits of the attending physician or physicians, the undertaker who officiated, the Master of Finance as to the standing of the deceased in the subordinate lodge at the time of death, and from such other person or persons as may be required; affidavits to be made before an officer authorized to take affidavits, and such authority must be certified by the

clerk of a court of record, or other competent authority, under seal.

"Section 2. All necessary legal papers required in order to secure the proper payment of benefits must also be furnished by the beneficiary or beneficiaries, and shall be forwarded with the proof of death to the Board of Control by the Secretary of the Section."

It is earnestly urged upon this Honorable court that the proof of death is therein provided to be furnished in all cases by the beneficiary and on the blank forms *to be obtained* of the Board of Control and the same shall contain the affidavit of the attending physician among other things. If, therefore, the learned trial court was right in excluding the physician's proof of death, which the plaintiff in error does not concede, then it was reversible error for the court to deny the motion (Rec., fols. 140, 141), to dismiss the complaint and we respectfully contend that the defendant in error finds herself in this dilemma; either the physician's proof of death was improperly excluded to the prejudice of the plaintiff in error, for which a new trial should be ordered or the motion to dismiss the complainant upon the ground upon which the same was made should have been granted, and the plaintiff in error's exception in that regard should be sustained and the complainant dismissed by this court. We will not undertake to argue to this Honorable court that where by the terms of the contract, for breach of which recovery is sought, the plaintiff must perform conditions precedent, it is incumbent upon the plaintiff to show performance. There is no strict compliance with the condition precedent of article 12 of the by-laws. There is no substantial compliance with the same. There is no preponderance of evidence that the same was complied with upon the theory of the learned trial court in ex-

cluding the physician's proof of death. But there is flatly upon this record the evidence of the plaintiff below, herself, called by the plaintiff in error, that she did not attempt to comply with the provisions of the by-laws in that regard and the complaint should have been dismissed. If the learned trial court was right in refusing to dismiss the complaint, then it follows, as the night the day, that the physician's proof of death should not have been tossed out of the case by the learned trial justice and the jury not permitted to regard the same.

Further, there was ample to sustain and to make proper, competent, relevant and admissible the very material piece of evidence now under examination. The plaintiff in error was entitled to have it in the case and it is respectfully urged that the judgment founded upon the verdict upon this record can not stand.

Aside from all this, however, it was once in the case and should have remained there (Rec., fol. 61). A cursory glance at the physician's proof of death (Rec., fol. 170), will show how material and necessary it was to the society's contention that Emanuel Meyer committed suicide.

POINT ELEVEN.

Section 836 of the Code of Civil Procedure of the State of New York, as the same existed at the time of the making of the contract in suit, is not construed in the Holden case according to the manifest intent of the Legislature.

The Honorable court, in deciding the Holden case, squarely overruled the decisions of the Appellate Division in the case of:

Foley vs. *The Royal Arcanum, supra,*
Dougherty vs. *Met. Life Ins. Co., supra,*

and reversed the opinion of the Appellate Division in the principal case. The Honorable court went upon the theory that the insertion in the statute of the words "upon the trial" made necessary the actual fact of physical waiver to take place in the presence of court and jury, within the court room, between the times of the commencement and and the finish of the actual trial of the issue.

It is respectfully contended that if the legislature meant that construction to obtain, then the amendment of that section in 1899, after the rendition of the opinion in the Holden case, was a nugatory and self-stultifying act of the legislature in attempting to add to the existing enactment precisely what this Honorable court had already said that section meant. We refer to the sentence then incorporated in the section, which reads as follows:

> "The waiver herein provided for must be made in open court on the trial of the action or proceeding, and a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such a waiver."

We further respectfully submit that if this be declaratory of the law as already announced by this Honorable court, that the last sentence in that section, as the same now stands, renders the remainder thereof inconsistent, incongruous and absurd. The sentence to which we beg leave to refer, reads as follows:

> "But the attorneys for the respective parties may, *prior to the trial*, stipulate for such waiver, and the same shall be sufficient therefor."

It would seem, therefore, to be the law of the State of New York, that an agent may do for his principal what the principal may not do for himself, and that if Meyer had caused the waiver in his application to be drawn by his legal agent or attorney, the evidence would have been admissible, under the last sentence of section 836, and that he has no power to do himself what his agent may do for him. We respectfully contend that this reduces the whole proposition upon which the respondent rests to a *reductio ad absurdum.*

POINT TWELVE.

The judgment should be reversed and judgment ordered for the defendant in error upon the offer of judgment for the sum of $363.76 with interest from the twenty-ninth day of September, 1900, to the twentieth day of January, 1902, and her lawful costs which had accrued up to that time, and in all other respects her complaint should be dismissed with costs in all the courts from that time, or a new trial ordered in which the excluded evidence shall be received, and further done herein to correct that error, what of right and according to the laws and customs of the United States should be done.

All of which is respectfully submitted,

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